THE DEVELOPMENT OF AMERICAN POLITICAL THOUGHT

BY WILLIAM SEAL CARPENTER

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LONDON: HUMPHREY MILFORD
OXFORD UNIVERSITY PRESS

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BY

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PRINCETON
PRINCETON UNIVERSITY PRESS
1930

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PRINTED AT THE PRINCETON UNIVERSITY PRESS
PRINCETON, NEW JERSEY, U.S.A.

PREFACE

MORE than a quarter of a century has elapsed since the appearance of Professor Merriam's *History of American Political Theories*. In that time there has been remarkably little written upon the development of political theory on this side of the Atlantic. This is unfortunate. It is true that the contributions of Americans to the subject of political theory have not in recent years been abundant or important. New ideas which have attracted much attention in England and upon the continent of Europe have passed almost unnoticed in the United States. But in the long years which lie between the planting of the first colonies in Virginia and Massachusetts and the inauguration of the government under the Constitution there was no lack of political theory in this country. The rich and suggestive ideas which were developed in the colonies and in the formative period of the Union deserve more intensive study than they have received.

The impetus to the development of political theory in America sprang from the long experience of the people with local self-government. Indeed, the American people had by 1787 come into posession of almost the whole of their stock of fundamental ideas. Borrowing largely from English liberal thought of the seventeenth century, American philosophers, clergymen and statesmen joined their efforts to adapt the ideas to the circumstances of a new country. At the same time the cultivation of ideas did not assume the form of a distinctively American political philosophy. There was an essentially practical character about the political speculations of American statesmen; they utilized theory for definite constructive ends.

The study of political theory in the American colonies cannot be undertaken apart from the study of the dominant ideas in England during the same period. It is the divergence between the ideas of the colonists and the political leaders at Westminster that

is important for the subsequent development of political theory in America. The materials for a thorough study of the growth of political theory in the colonies cannot be reached in the United States; they lie deeply buried in the British Museum and the Public Record Office at London. The small amount of these rich materials which have been made available for the preparation of this book may encourage other students to continue the research. Certainly the English hold the title deeds to American civilization.

The development of political theory in the years following the adoption of the Constitution is complicated by partisan controversies over the issues of the day. Professor Merriam has given an excellent account of the tendencies which prevailed, and it is unnecessary to recanvass his analysis of the characteristic types of speculation. But there are aspects of the subject with which he has not dealt. Viewed in proper perspective, the period from 1787 to the outbreak of the Civil War is one in which the liberal thought of the Federal Convention attained its full fruition. It was only by stages that democracy was achieved in the United States. The two pillars of American democracy, universal suffrage and majority rule, had scarcely been established when the people of this country were compelled to embark upon a sanguinary war to determine whether their political system should endure. The victory of the armed forces of the United States settled many controversies, but it marks the end of the period of growth in American political thought. Since the Civil War there has been little stimulus to novelty; the slight development which has taken place has been confined to the rearrangement of the concepts of political theory to keep pace with the legal and institutional growth of the country.

In preparing this book I have drawn upon my earlier work, *Democracy and Representation,* for some of the materials in Chapter III. I wish to express my gratitude to my colleague Professor Alpheus T. Mason, who read the manuscript and made some helpful suggestions, and to my wife, who has given me valuable assistance with the proof sheets.

W.S.C.

Princeton, January 18, 1930.

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CHAPTER I

CONTRACT AND CONTROVERSY

POLITICAL thought during the formative period of American institutions was dominated by the philosophy of the social contract. In the Federal Convention, when the conflicting aims of factions had produced a deadlock, James Madison remarked that they had assembled to frame "a compact by which an authority was created paramount to the parties, and making laws for the government of them."[1] Luther Martin had just concluded a lengthy speech, in which he exhausted his own strength and the patience of his audience in an attempt to show that the general government ought to be formed for the States rather than for individuals. But neither the weight of his argument, supported by passages from Locke, Vattel, Rutherford and Priestly, nor the vehemence of its delivery, could confute the delegates who regarded the document then under construction as the work of the whole people of the United States. Differences existed as to who were the parties to the agreement, but nobody doubted that "by compact of the most solemn and original kind a new political organization and a new indissoluble unit was being reared in America."[2]

In a sense, America has always been the abiding place of the compact philosophy. For more than three hundred years the contractual idea as the basis of social organization has commanded profound respect in this country. In 1620 it took the form of the church covenant; in 1776 it led the patriots through the phrases of John Locke to charge George III with the design to reduce them under absolute despotism. Today the hypothesis of social solidarity secures for the original contract at least in part its former wor-

[1] M. Farrand, *Records of the Federal Convention* (1911), I, p. 446.
[2] A. C. McLaughlin, *The Courts, the Constitution, and Parties* (1912), p. 200.

ship.[3] But the fundamental notion is the same; it is the familiar act of human agreement without which it is assumed no association is possible.

The famous Mayflower Compact was the first political covenant to be drawn up in the new world. Acknowledging themselves to be the loyal subjects of King James I, the Pilgrims agreed to combine themselves into a civil body politic for their better order and preservation. In a few brief phrases they proposed that the body thus constituted should enact such laws and establish such offices as might be for the general good of the colony. To these they promised due submission and obedience.

The framers of the Mayflower Compact doubtless were unable fully to recognize the implications in their document, but they believed it to be "as firm as any patent, and in some respects more sure."[4] Its clauses would serve to hold together the disaffected and control the mutinous until a charter could be granted.[5] That the faith of the Pilgrims in the efficacy of formal agreement was so staunch is due to their church covenants of which the Mayflower Compact is the logical extension. To Sir Edwin Sandys, from whose company the followers of John Robinson sought a charter in 1617, they said: "We are knit together as a body in a most strict and sacred bond and covenant of the Lord."[6] Nor could they forget the oft-repeated words of their pastor, that their association was the result of a "covenant with God to walk in his ways."[7]

Puritans in religion, the earliest settlers of New England could claim kinship through ideas with the Huguenots of the sixteenth century. They did not, it is true, subscribe to the doctrine of tyrannicide set forth in the *Tocsin* and the *Reveille-matin* following the massacre of St. Bartholomew's Day. The *Franco-Gallia* defending the principle of elective kingship encouraged revolt against Henry III, yet its influence was scarcely felt outside France. But

[3] H. J. Laski, *Foundations of Sovereignty* (1921), p. 209.
[4] W. Bradford, *History of Plymouth Plantation* (ed. Deane), pp. 89-90.
[5] A. R. Lord, "The Mayflower Compact," *American Antiquarian Society Proceedings,* XXX, p. 278.
[6] Bradford, pp. 22-3.
[7] J. Robinson, *Works* (1851), II, pp. 132, 142.

the notion of the original compact depicted in the *Vindiciae Contra Tyrannos* furnished a powerful medium for political thinking long after the Huguenot party had succumbed to the centralizing tendencies of Bourbon absolutism.[8]

According to the *Vindiciae Contra Tyrannos*, kingship is ordained by God, but it is the people who "establish kings, put the sceptre into their hands, and who with their suffrages approve the election."[9] Between God, the king, and the people, there is a covenant for the maintenance of the true religion. There is also a covenant "between the king and the people, that the people shall obey faithfully, and the king command justly."[10] This contract is made in subordination to the law of nature, which "teaches and commands us to maintain and defend our lives and liberties."[11] Therefore, any violation of the contract by the king is tyranny and may be resisted by the people.[12]

Before this pamphlet had fallen from the press, Buchanan, from his scrutiny of Scottish law and history, was composing his great dialogue.[13] This famous treatise not only adopts the theory of contract but also finds the source of human association in "a certain innate propensity, not only in men but also in other animals of the gentler tribes, to associate readily, even without the allurements of utility, with beings of their species."[14] Buchanan thinks they are

[8] G. Weill, *Les Théories sur le Pouvoir Royal en France Pendant les Guerres de Religion* (1891), pp. 94-7. The influence of the *Franco-Gallia* is admirably discussed by Weill, Chaps. v-vi. The separatist tendencies among the Huguenots are described by L. Anquez, *Histoire des Assemblées Politiques des Réformés de France* (1859), pp. 1-13. The best monograph on the political activities of the Huguenots after the massacre of 1572 is P. Corbière, *De l'organization politique du parti protestant arrêtée à l'assemblée générale tenue à Millau en décembre 1573* (1886). See also E. Armstrong, *The French Wars of Religion* (1904), pp. 34, 40-1, 44-5.

[9] *Vindiciae Contra Tyrannos* (ed. Laski), p. 118.

[10] *ibid.*, p. 71.

[11] *ibid.*, p. 190.

[12] *ibid.*, pp. 191, 197, 199.

[13] G. Buchanan, *De Jure Regni Apud Scotos* (1579). I have used the English translation of 1799. An English translation of the book was published at Philadelphia in 1776 by Andrew Steuart.

[14] *ibid.*, p. 93.

to be reckoned citizens "who obey the laws and uphold the social compact, who choose rather to undergo all labors and dangers for the common safety than, dishonorably, to grow old in ease and sloth."[15] Between the king and his subjects a contract exists; he who deviates from the contract dissolves it, and any rights which he may have enjoyed thereunder are forfeited.[16] Thus Buchanan brings very near to England the compact philosophy and fixes the doctrine by which the Scottish nation organized itself against the king in the famous covenant of 1638.

It is important to note that the Scotchman recognized "utility as one cause, but not as the absolute mother of justice and equity, as some would have her; but rather as their handmaid, and one of the guardians of a well-regulated community."[17] The fundamental impulse to social life springs from nature, which is "the light infused into our minds by the divinity."[18] Similarly, the separatists of post-reformation England were not steeped in the utilitarianism of today; they were able to pursue the idea of right beyond mere utility. "Is this so strange to John Robinson?" wrote a contemporary opponent of the Pilgrims. "Do we not know the beginnings of his church? That there was first one stood up and made a covenant, and then another, and these two joined together, and so a third, and these became a church, say they."[19] In this undoubtedly true account of the formation of the Scrooby-Austerfield congregation is disclosed a belief that in agreement consecrated by God is found a rule for human conduct.

Closer to the Pilgrims than the theories of the Huguenot pamphleteers were the ideas current during the stay of Robinson and his flock in Holland, where the work of Althusius had just appeared. A Calvinist in religious belief, Althusius declined a call to the University of Leyden shortly before Robinson settled in the college town.[20] His book, *Politica Methodice Digesta*, was first pub-

[15] *Buchanan*, p. 188
[16] *ibid.*, p. 197.
[17] *ibid.*, p. 95.
[18] *ibid.*, p. 94.
[19] O. S. Davis, *John Robinson* (1903), p. 48. John Robinson acknowledged "the Churches of Scotland to be Churches of Christ." A. Young, *Chronicles of the Pilgrim Fathers* (1841), p. 395.
[20] O. Gierke, *Johannes Althusius* (1880), p. 12.

lished in 1603, but was subjected to revision and reprinted in 1610. According to Althusius, the contract is social; it is the mutual agreement of all to live in an ordered society. The efficient cause of political association is consent and the mutual agreement of the citizens joined together; the final cause is convenience, happiness and common defense.

Society is composed of social groups raised by a continuous progression from private to public relationships. That is to say, there is in Althusius a federalistic idea which displays the state as entirely built up on the principle of associations. At the bottom are presented the natural functions and relations such as arise out of marital relationships and the family organization. From these come the civil relationships, born of wills which have united and created, in the human life, artificial groups for the utility of many. Examples of the latter are colleges, cities, provinces and empires. But the principle of association is always the same; it is that of contract. The system of Althusius is admirably adapted to support his definition of politics, which is the art of joining men together for the establishment, the direction and the preservation of the social life.

From the thinking of Althusius flowed a stream of ideas that fitted in with the notions of the English dissenters.[21] His theory of contract was far more valuable to them than that of the Huguenots, who assert that the compact is a bond between governor and governed, which settles the relations of each and is therefore above legal review.[22] It is difficult to believe that John Robinson and his followers, as they engaged in theological controversy with the intellectual leaders of Leyden, failed to absorb Althusius' great philosophical statement of the principles of liberty for which the Dutch had so valiantly struggled.[23]

The connection between religion and politics remained to be

[21] E. de Beauverger, *Tableau de la philosophie politique* (1858), pp. 69 *ff.*
[22] J. N. Figgis, *From Gerson to Grotius* (1923), p. 176.
[23] An account of the relations between the Pilgrims and the members of the University of Leyden will be found in H. M. Dexter, *Congregationalism of the Last Three Hundred Years,* etc. (1880), Chap. VII.

demonstrated by Boxhorn, the follower of Althusius. Born in 1612, Boxhorn became the successor of Heinsius at the University of Leyden. His thought embraced at once the political philosophy of Althusius and the religious principles of the liberal theologians. He conceived the care of religion and the promotion of piety to be the duty of the state. Indeed, religion was regarded as so necessary to social welfare that the vainest superstition was preferable to atheism. While there could be only one true faith in the sight of God, magistrates might allow the existence of more than one religion if necessary to secure peace and good order. But the government ought to pronounce in favor of any new religion which is sought to be set up in the state.[24] The similarity between the ideas of Boxhorn and those of the first settlers of New England discloses the common influence communicated to them in Leyden.

It has been argued that the Pilgrims regarded their compact as the basis of a popular government within which they should exercise sovereign powers.[25] But neither the language of the document nor the subsequent conduct of the Plymouth Colony in seeking a charter from England supports this contention. Thomas Morton regarded the interference with his festivities at Merrymount as an excess of authority by Governor Bradford. He thought that he and his comrades had "the law in their own hands, there being no general government in the land." The settlers at Plymouth he conceived to be without authority, since they "disregarded the duty

[24] de Beauverger, pp. 85-6.

[25] *Mourt's Relation* (ed. Dexter), Preface, pp. xliv-xlvi. In his "Justification of Separation from the English Church," John Robinson denied that the Pilgrims contemplated any change in the political system. *Works,* II, p. 17. The Massachusetts settlers were equally firm in their protestations of loyalty to England. "There is no land that claims our name," declared the minister of the congregation at Taunton, "but England, we are distinguished from all the nations in the world by the name of English. There is no potentate breathing, that we call our dread sovereign, but King Charles, nor laws of any land have civilized us, but England's; there is no nation that calls us countrymen, but the English. . . ." W. Hooke, *New England's Tears for Old England's Fears* (1641).

they owe their sovereign whose natural born subjects they were."[26] But interference from Plymouth did not come until Morton had endangered the public peace by selling firearms to the Indians, and then it took the form only of breaking up his illicit practices. The sovereign power of England was fully recognized by the transfer of the trouble-maker to England for judicial proceedings.[27]

The Massachusetts Bay Colony was established not upon the basis of a church covenant but of a trading company charter. The settlers, although Puritans, were not separatists and many were devout members of the English church. Nonconformity was encouraged, however, by the conditions of colonial life.[28] This tendency was accelerated by the commission given in 1634 to Archbishop Laud and others to make laws for the government of the colonies in ecclesiastical matters and to supervise their civil magistrates.[29] The measure not only threatened the integrity of their charter but also foreshadowed the loss of religious freedom which many had hoped to obtain by emigrating.[30] Recourse was had to the church covenant through which various groups, electing their own pastors and teachers, declared their independence of Archbishop Laud and his ecclesiastical authority.

The church covenant was in the seventeenth century to undergo many vicissitudes, but it remained throughout basically democratic. In theory it proclaimed the sovereignty of the congregation. To the Puritans of New England their church organizations represented on the one hand the logical culmination of the religious revolt begun by Luther and on the other the prototype of the only civil government consistent with their religious ideals. Independency carried on the reformation of ecclesiastical power in thoroughgoing fashion, until "the people of the particular churches

[26] T. Morton, *New English Canaan* (1632), Chap. XVI. Reprinted in Force Tracts, IV.

[27] Bradford, pp. 237 *ff.*; J. Winthrop, *History of New England* (ed. Savage), I, pp. 41-3.

[28] Winthrop, I, p. 37. See *Letter of Israel Stoughton* (1635) for an account of events at variance with that of Winthrop's *History*. Reprinted in *Massachusetts Historical Society Proceedings*, LVIII, p. 450.

[29] *Calendar of State Papers, Colonial, 1574-1660*, p. 177.

[30] *ibid.*, p. 157.

should come in for a share, according to their places and proportions."[31] At the same time, the separation of spiritual and temporal authority was enjoined, although the bearers of civil rights must also be church members. With John Calvin they agreed that the primary function of secular rulers is the care of piety and religion.

Whether founded upon a church covenant or a patent from the Crown, authority in New England did not go unchallenged. The incident of Morton and the revellers at Merrymount was followed by the controversy of Roger Williams with the government of Massachusetts. Williams accepted literally the separation of ecclesiastical and civil power, and the measures which led to his departure from the colony were occasioned by "the firmness with which he maintained the doctrine that the civil power has no control over the religious opinions of men."[32] He had scarcely formed through the medium of a compact his own settlement in Rhode Island when this was flouted by Samuel Gorton. An enterprising and contentious individual, Gorton denied on the one hand the authority of the governments in Rhode Island, because they were not authorized by patent from the Crown or Parliament of England, and on the other hand resisted the government of Massachusetts on the ground that it had no jurisdiction over the territory in which he had settled.[33]

The case of Dr. Child and his fellow-remonstrants in 1646 created the most difficult situation with which the first settlers of Massachusetts had to deal. It demonstrated at once the lengths to which the government was prepared to go in preventing interference from England and the extent to which the civil power had fallen under the control of the churches. Dr. Child and the other signers of his petition were Presbyterians who sought to take advantage of the conflict then raging in Parliament between the Presbyter-

[31] T. Hooker, *A Survey of the Summe of Church Discipline* (1648), Preface.
[32] S. G. Arnold, *History of Rhode Island* (1894), I, p. 41. See also H. M. Dexter, *As to Roger Williams* (1876), *passim*, and Winthrop, I, p. 63. The controversy between Roger Williams and John Cotton is described in C. E. Merriam, *American Political Theories* (1903), pp. 7-13.
[33] S. Gorton, *Simplicities Defense* (1646). Reprinted in Force Tracts, IV. See also E. Winslow, *Hypocrisie Unmasked* (1646), p. 6.

ians and the Independents to obtain for themselves religious liberty and civil rights in the colony.[34] They appealed immediately to the general court of the colony, but they never expected that body to act favorably upon the petition. What they wanted was an opportunity to appeal to Parliament in the hope that the colonists would be forced to take the covenant.[35] Their proposal looked to the establishment of English law as the basis of rights in Massachusetts, rather than the colonial rules arising out of the charter, and would have overturned the government founded on the patent and subverted the church institution.[36] The vigorous opposition which the petitioners encountered from the Massachusetts government was due in part to the determination of the colonists to uphold their charter, but it was equally attributable to the eagerness with which the clergy sought through the civil power to protect the churches.[37]

The subordination of the civil government to the ecclesiastical, and the consequent creation of theocracy, in Massachusetts was wholly adventitious. The opportunity was afforded by the civil wars in England, which distracted attention from the colonies. But the peculiar course of events was due chiefly to the superior intelligence of the clergy. "By their ability and moral influence the ministers had acquired a supremacy in the state which they used in part to counteract the growth of democratic ideas."[38] John Winthrop in a fit of passion condemned the interference of the clergy in civil affairs, but he wrote that "a democracy is among civil nations the meanest form of government."[39] Nor did he flinch in the face of the invitation given by the general court of Massachusetts to John Cotton "to draw an abstract of the judicial laws

[34] J. Child, *New England's Jonah Cast Up at London* (1647). Reprinted in Force Tracts, IV.
[35] G. L. Kittredge, "Robert Child, the Remonstrant," *Publications of the Colonial Society of Massachusetts,* XXI, pp. 1-46.
[36] Winthrop, II, p. 347.
[37] *ibid.,* pp. 341-2, 345.
[38] G. P. Gooch, *English Democratic Ideas in the 17th Century* (1898), p. 79.
[39] Winthrop, II, pp. 427 *ff.* Winthrop's argument that the church has no power to call any civil magistrate to give account of his judicial proceeding in any court of justice will be found in R. C. Winthrop, *Life and Letters of John Winthrop* (1864), II, pp. 211-14.

delivered from God by Moses, so far forth as they were of moral [i.e., of perpetual and universal] equity." Cotton not only framed for the people a body of laws, but also advised them "to persist in their purpose of establishing a *Theocracy* [i.e., God's government] over God's people." The code prepared by Cotton was not accepted but was subjected to further changes by Nathaniel Ward. Nevertheless, the Abstract of Laws, or Body of Liberties, passed in 1641 bears the imprint of its clerical manufacture. The door was thus opened to ecclesiastical interference in civil affairs. "It was an usual thing, henceforth, for the magistrates to consult with the ministers in hard cases, especially in matters of the Lord."[40]

Now this involved at once a departure from the vital principle of Independency, the separation of church and state, and the inversion of the church covenant to divest the congregation of its powers of government which became lodged in the ministers. Just as Hobbes inverted the social contract to secure the surrender of all individual rights in behalf of the sovereign, so the theocrats utilized the church covenant to give the clergy control over the congregation.[41] Their situation was not essentially different from that of the Presbyterians. The *Simple Cobbler of Aggawam* could with truth declare: "I fear, he that sayes the Presbyterian and Independent way, if rightly carryed do not meet in one, he doth not handle his compasses so considerately as he should."[42] Freed from close contact with any of the great religious parties in England, the theocrats were able to establish an ecclesiastical system indigenous to the colony. Although resembling the forms of Independency, their system was such that they could say with John Cotton: "We are wrongly called Independents."[43]

The course of the theocrats in Massachusetts can hardly be understood, except it be regarded as a struggle to preserve the

[40] J. Norton, *Memoir of John Cotton* (1652), pp. 46-7.
[41] J. Davenport, *Power of the Congregational Churches Asserted and Vindicated* (1672), pp. 119 *ff*. See also John Cotton, *Way of the Congregational Churches Cleared* (1648) and R. Mather, *An Apologie of the Churches in New England for Church Covenant* (1643).
[42] N. Ward, *The Simple Cobbler of Aggawam* (1647), p. 29. Reprinted in Force Tracts, III.
[43] Cotton, *Way of the Congregational Churches Cleared*, p. 11.

integrity of their churches. They may have desired to conciliate the Independents and Presbyterians in England.[44] They may have believed that they were engaged in a great experiment the successful outcome of which would insure the establishment of a similar system in England.[45] But they were more immediately concerned to prevent interference by outsiders with their religious institutions. It is well known that the Puritans came to America not to establish religious liberty but to gain freedom for their own forms of worship. In order to maintain this freedom, they found it necessary to exclude not only from communion but also from civil rights all persons who could not give evidence of that peculiar transformation of the spirit which would entitle them to membership in their churches. Religious toleration, they believed, "firmly provides free stable-room and litter for all kinds of consciences, be they never so dirty or jadish."[46]

The ideal of self-contained communities inherent in the theocratic system could be reconciled neither with the immigration of settlers who were not of the "visible saints" nor with the removal from the colony of those who were steadfast in the faith. The barbarous persecution of the Quakers after 1657 was merely a continuance of the policy which had resulted in the banishment of Roger Williams and Ann Hutchinson.[47] Rival faiths could not be tolerated and the introduction of episcopacy into Massachusetts was "a thing more dreaded than the Indian War."[48] Fortunately for the progress of religious freedom the Quakers were sufficiently powerful

[44] Dexter, pp. 412-14. See also *The Kingdom's Divisions Anatomized* (1649). This pamphlet not only reveals the connection between the churchmen of Massachusetts and the revolutionary party in England but also appeals to the Presbyterians to unite with the Independents.

[45] T. Lechford, *Plain Dealing* (1642), p. 80.

[46] *Simple Cobbler of Aggawam,* p. 6. "You know right well that the Churches of Christ have not thrived under the tolerating government of Holland, from whence the Lord hath translated one Church already to the place whither you are now to go; and further it is well known loose liberty cannot endure to look majesticall authority in the face." *Johnson's Wonder-Working Providence* (ed. Jameson), p. 32.

[47] T. Welde, *A Short History of the Rise . . . of the Antinomians* (1894), *passim.*

[48] *Calendar of State Papers, Colonial, 1675-1676,* p. 407.

at the court of Charles II to secure an abatement of the worst barbarities practised by the Massachusetts theocrats.

But the frantic efforts of the ministers to maintain orthodoxy at any cost could not restrict the people to the seaboard settlements. The frontier beckoned with its allurements of free lands and less burdensome taxation. Cotton Mather, writing in 1694, warned his parishioners not to "go out from the institutions of God, swarming into new settlements, where they and their untaught families are like to perish for lack of vision. They that have done so, heretofore, have to their cost found that they were got unto the wrong side of the hedge." His warning was in vain; the frontier might be the wrong side of the hedge but it offered a more abundant life. People refused to remain within the seaboard towns where they might be non-proprietors or at most proprietors of a tiny acreage, when by moving westward they could become proprietors of unlimited soil.[49]

The Puritan system in Connecticut affords a parallel to that in Massachusetts that is interesting because of its diversity. Under the leadership of Thomas Hooker the church covenant assumed a form that is truly Lockean in its conception. Not only have the people "the power to appoint officers and magistrates; it is in their power also to set the bounds and limitations of the power and place unto which they call them."[50] Forty years before Locke's *Two Treatises of Civil Government* saw the light, Thomas Hooker envisaged in contract the basis of human association. "Every spiritual or ecclesiastical corporation," he said, "receives its being from a spiritual combination." It is the will of each member that furnishes "the cement which solders them all," for "there is no man constrained to enter into such a condition, unless he will; and he that will enter, must also willingly bind and engage himself to each member of that society to promote the good of the whole, or else a member actually he is not."[51]

The distinguishing characteristic of the church covenant accord-

[49] F. J. Turner, *The Frontier in American History* (1920), pp. 64, 65.
[50] G. L. Walker, *Life of Thomas Hooker* (1891), pp. 124-5.
[51] Hooker, p. 50.

ing to Hooker is the emphasis placed upon free will. Residence in a community gives no "man rights or makes him matter fit for a visible congregation."[52] But the act of agreement not only authorizes the association but also establishes the individual in conjunction with his fellows as the judge of its powers. "In all combinations," said Hooker, "there is and will be some common end. That end must have means to attain it; to these means and rules each man must bind himself to attend, and in case he do not, to submit to another, to be directed and reformed, or else to yield to the whole, that he may be censured and removed therefrom. . . .

"Mutual subjection is as it were the sinews of society, by which it is sustained and supported.

"Hence every man is above another, while he walks according to rule; and when he departs from it, he must be subject to another.

"Hence every part is subject to the whole, and must be serviceable to the good thereof, and must be ordered by the power thereof."[53]

The ideas of Hooker set forth in the *Survey of the Summe of Church Discipline* were developed with reference to church government. But they are identical with those set forth in his sermon of May 31, 1638, to the general court of Connecticut upon the business of framing a body of laws for the new colony. Upon that occasion he laid down the doctrine that "the choice of public magistrates belongs unto the people by God's own allowance." The solemn privilege of electing their magistrates must, however, be exercised by the people not "according to their humors, but according to the blessed will and law of God." While the people "have the power to appoint officers and magistrates, it is in their power also to set the bounds and limitations of the power and place unto which they call them."[54] To Hooker the foundation of authority in both church and state is in the free consent of the people. The notion of contract is therefore equally valid as the basis of ecclesiastical and civil government.

[52] *ibid.*, p. 13. An account of the method of admission to church membership is given in Lechford, pp. 5-8.
[53] *ibid.*, p. 119.
[54] *Connecticut Historical Society Collections*, I, p. 20.

The conclusion to be drawn from the thought of Hooker is that if formal agreement suffices to establish the foundation of human association, the individual becomes to a remarkable degree the master of his own destiny. The freedom of the human will can never be argued away to permit the enslavement of the individual. That is to say, men who were at any time in the possession of the freedom of contract cannot be deemed to have parted with that freedom, the protection of which was the object of their agreement. In this sense the individual becomes and continues to be the final judge of his own conduct. Whatever measure of liberty the individual may yield to society is relinquished solely for convenience and upon terms revocable at his pleasure.

But this broad conception of individual liberty cannot be reconciled with the authority necessary to stability in government. Many years later John Stuart Mill, in his *Essay on Liberty,* presented unimpeachable arguments for the entire freedom of thought and discussion, yet he could not, when projecting his principles into the field of human action, draw a satisfactory distinction between the individual and society. Government presupposes at least some general rules, assent to which cannot be withdrawn at the pleasure of the individual. Man has certain obligations as a social being which he must discharge, although it require the sacrifice of a measure of individuality.

The seventeenth century theologians found no means of limiting the free will of the individual in behalf of social arrangements, except by reference to the duty of man to God. Viewed in this light, it seemed to Thomas Hooker that, "as God hath spared our lives, and given them in liberty, so to seek the guidance of God, and to choose *in* God and *for* God," submission to authority was divinely enjoined.[55] Hooker's more aristocratic contemporary, John Davenport, told the people of Boston that "men interested personally in Christ" should be chosen for public office. "You must submit," he said, "to their authority and perform all duties to them, whom you have chosen to be your rulers, whether they be good or bad. . . . If men unjust, and that fear not God, be chosen rulers of the com-

[55] *Connecticut Historical Society Collections,* I, p. 21.

monwealth, all the people are in danger of being punished by the wrath of God for the sins of their rulers."[56] The church covenant therefore could not contain within itself the means of its own determination; it could only be interpreted in the light of divine revelation.

It is to the credit of John Locke that he brought to the theory of contract a means of interpreting the agreement. Locke discerned in man "a title to perfect freedom, and an uncontrolled enjoyment of all the rights and privileges of the law of nature, equally with any other man, or number of men in the world," as a birthright.[57] But this same law of nature teaches all mankind that no one ought to harm another in his life, health, liberty, or possessions.[58] Since the keeping of contracts is a cardinal principle of natural law, the agreement by which men divest themselves of enforcing the law falls under its own protection.

According to Locke, the law of nature is to be sought in human experience. He envisaged what Stammler has called a "natural law with a changing content,"[59] the validity of which is tested by the principle of utility. Thus he laid the foundations for a theory of natural law which James Wilson in a later day was to teach in the United States. "The moral sense," said Wilson, "comes to maturity by insensible degrees."[60] If we will consult the history of mankind, "we may infer that the law of nature, though immutable in its principles, will be progressive in its operations and effects."[61] It should not be overlooked that Alexander Hamilton, as he contemplated the problem of natural law, discovered its source in human nature. "The sacred rights of mankind," he wrote, "are not to be rummaged for among old parchments or musty records. They are written, as with a sunbeam, in the whole volume of human nature, by the hand of the divinity itself, and

[56] J. Davenport, *Election Sermon, May 19, 1669.* Reprinted in facsimile in *Publications of the Colonial Society of Massachusetts,* X, pp. 6 *ff.*
[57] *Two Treaties of Civil Government* (Everyman's Library ed.), pp. 158-9.
[58] *ibid.,* p. 119.
[59] Laski, *Authority in the Modern State* (1919), p. 64.
[60] *Works* (1804), I, p. 137.
[61] *ibid.,* p. 143.

can never be erased or obscured by mortal power."[62] Whether the obligation to observe the law of nature spring from utility or from an innate moral sense, it must for practical purposes find reflection in human experience.

Now the primary concern of the individual is to secure liberty. The whole effort of the Massachusetts theocracy was directed toward the substitution of civil liberty under authority for the liberty enjoyed by man in his natural state. "If you stand for your natural corrupt liberties," John Winthrop told the people of the colony, "and will do what is good in your own eyes, you will not endure the least weight of authority, but will murmur and oppose, and be always striving to shake off that yoke; but if you will be satisfied to enjoy such civil and lawful liberties, such as Christ allows you, then will you quietly and cheerfully submit to that authority which is set over you, in all the administrations of it, for your good."[63] This conception of liberty reveals a clear distinction between natural and civil liberty. The acceptance of the idea encounters opposition because it is tied up with the doctrine of passive obedience. Winthrop performs a real service in distinguishing the fact that liberty can exist only in subordination to authority, but he robs his concept of real value by investing authority with such power that it may crush liberty. In other words, he failed to see that a government may actually destroy the liberty it is intended to preserve, when it ceases to be accountable to the people.

Locke conceived the social contract not only as a device to effect the grant of authority but also as a means of securing liberty. He admits neither the surrender of all natural rights into the hands of a sovereign nor the absolute submission of the individual to the will of God as it may be revealed in the homilies of the ministers. His contract is limited and specific. On the one hand it delegates the powers which government is to enjoy, while on the other hand it marks out the sphere of liberty which the individual continues to retain.

It is precisely at this point that the conflict between liberty and

[62] *Works* (ed. Lodge), I, p. 113.
[63] Winthrop, *Life and Letters,* etc., II, pp. 339 *ff.*

authority emerges. The rights reserved to the people assume definite form only when government in imposing duties upon the individual breaks through the limits which circumscribe its power. In order to avert this conflict, or to redress an injury done as a result of such conflict, Locke interposes the right of revolution. It is true, the power of the congregations to discipline or to depose their officers and ministers had been asserted in the church platforms.[64] At the same time the philosophy of the theocrats was so permeated with the dogma of Divine Right that this power was denied in practice. Even the right of the people to petition the magistrates was denied by John Winthrop on the ground that it "savors of resisting an ordinance of God," and "amounts to a plain reproof of those whom God hath set over them, and puts dishonor upon them, against the tenor of the fifth commandment."[65]

But according to Locke, a dissolution of the government takes place not by any hostile act of the people but by the usurpations of those to whom authority has been delegated. It is the legislature or the executive acting contrary to the trust reposed in them that brings about the dissolution of government. Then and there arises the right of revolution whereby the people repossess themselves of their powers in order to delegate them into other hands. It was the "repeated injuries and usurpations" of George III that led the framers of the Declaration of Independence to affirm "that these united colonies are, and of right ought to be free and independent States."

The central point of controversy is reached in the search for some criterion whereby to determine the validity of acts of government. Locke agreed that the right of revolution ought not to be exercised for light and transient causes, and that all changes should require the assent of a majority of the people. But, like all the natural-rights philosophers, he left a fruitful source of debate in the unanswered question who should judge between the people and the government. In practice it has become obvious that the

[64] Hooker, p. 192; J. Wise, *Vindication of the Government of New England Churches* (1772), p. 14.
[65] Winthrop, *History*, I, pp. 362-3.

people alone can be the judge of a breach of trust by their rulers. In other words, a preponderant public opinion must pass upon the acts of government.

Locke wrote his book to justify the English Revolution of 1688. That revolution was not without its repercussions in New England; it coincided closely with the overthrow of Governor Andros by the Boston mob. At the same time, Increase Mather was in London as the representative of the congregations of Massachusetts seeking the restoration of the old charter privileges.[66] His pleas that the theocracy be restored were unavailing; William III insisted upon a governor appointed by the Crown and a property, not a religious, qualification for the franchise. The charter of 1691 was far more enlightened than the document desired by Mather. In conformity with the liberal spirit of English political thought of the time, the people of Massachusetts, through the substitution of a property qualification for the franchise, in place of the old religious test, and the restoration of the popular assembly, gained a modicum of genuine self-government. They at least shared in the benefits derived from Locke's doctrine that political power exists and is exercised only for the public good.

Other influences of the revolutionary philosophy were less direct although not less important. Locke's political writings came to Virginia before 1700, but they were not read widely until a somewhat later date.[67] The writings of Locke, Pufendorf, Sidney and Coke were to be found in the libraries of Virginia planters early in the eighteenth century.[68] At the same time, the booksellers in Boston had few works other than religious or theological in their

[66] *Andros Tracts* (1868), *passim*; K. Murdock, *Increase Mather* (1925), pp. 211 *ff.*

[67] *William and Mary Quarterly*, II, p. 169.

[68] Lists of books owned by early settlers in Virginia will be found in *Virginia Magazine of History and Biography*, II, p. 238; III, p. 388; VI, pp. 145 *ff.*, 261-2; XVII, p. 147; XVIII, p. 181. The character of the philosophical studies at Yale College in 1714 is described by P. E. Aldrich, "John Locke in America," *American Antiquarian Society Proceedings*, 1879, pp. 31-2. The college curricula as they existed at that time are described in J. Quincy, *History of Harvard University* (1860) and E. Oviatt, *Beginnings of Yale* (1916).

stores.[69] But from whatever source derived, the ideas contained in the political classics found lodgment in the minds of the clergy.[70] New England election sermons gained both in vitality and interest from the intermingling of Biblical passages and quotations from the political philosophers. Natural law proved especially fascinating to the ministers. They had already been taught in their theology that the law of nature was also the law of God. The political philosophers gave them new applications and new adaptations of natural law in which they took exuberant delight.

The concept of natural law offered to clergymen a powerful solvent for doubts in politics as well as theology. By appeal to its generous principles, absolutism could be dismissed from both New England and Old England. John Wise, the son of an indentured servant, battled successfully with Increase Mather to save all that was democratic in the old discipline of the New England churches and turned to write of government in sentences which might have been drawn from the pages of John Locke. Acknowledging his indebtedness to Pufendorf, the guide of Locke, Wise sought to discover "the law of nature, or the true sentiments of natural reason, with respect to man's being and government."[71] Government, he thought, results from the free contracts of men, and not from divine ordination. Nor is there a presumption in favor of any particular form of government; "the government of the Jews was changed five times."[72] The law of nature, which Wise defines as "the dictate of right reason," is at once the impelling cause of the civil state and the measure of its power. To rebel is to violate the law of nature; but the ruler as well as the ruled may be guilty of rebellion. For "where the constitution of a nation is such, that the laws of the land are the measures both of the sovereign's commands, and the obedience of the subjects, whereby it is provided:

[69] J. Dunton, *Letters from New England* (1867), pp. 314 *ff.* See also T. G. Wright, *Literary Culture in New England* (1920).
[70] A. M. Baldwin, *The New England Clergy and the American Revolution* (1928), Chaps. I, II.
[71] *Vindication of the Government of New England Churches* (1717), p. 18. The citations are from the edition of 1772.
[72] *ibid.*, p. 22.

that as the one are not to invade what is granted to the ruler; so the other is not to deprive them of their lawful and determined rights and liberties; then the prince who strives to subvert the fundamental laws of the society is the traitor and the rebel, and not the people, who endeavor to preserve and defend their own."[73]

In the thought of Wise, natural law is not a real entity; it is a derivative from God. The Ipswich pastor uses the terms God and nature, but he does not draw a complete distinction between them. He does not rely upon the principle of Grotius which regards natural law as absolutely immutable, incapable of change even by God himself.[74] Wise is not, therefore, an exact forerunner of the revolutionary leaders who, when they came to argue from natural rights, sought a complete severance of divine and natural laws. It was, in fact, to Locke and not to Wise that men like Samuel Adams turned for help. Nevertheless Wise's treatise put in virile language ideas of democracy and equality which were soon to become widespread in the colonies. For a time the vested interests of the churches and the tithes collected for the support of the preachers gave semblance to a clericalism that in fact did not exist.[75] But the political power of the theocracy had collapsed; its political philosophy could not long be expected to survive.

[73] *Vindication of the Government of the New England Churches,* p. 35.

[74] I. W. Riley, *American Philosophy* (1907), p. 26.

[75] Congregationalism was so strongly entrenched in New England that other religious groups continued at a disadvantage long after the Puritan régime in politics had perished. "Episcopal ministers have been mobbed here," wrote a memorialist from Boston in 1727, "and bonfires made near their houses, mocked and insulted and forced to keep within doors. Mr. MacGregor, the only Presbyterian minister, a man of bright natural parts and extraordinary learning, has been anathematized." *C.O. 5 No. 752.*

The taxation of all persons in Massachusetts for the support of the dissenting ministers was a real grievance. Increase Mather and the dissenting clergy promised George I that all Anglicans "shall by the grace of God ever receive from us all that Christian and brotherly respect which the spirit of Christianity and the most universal charity doth direct unto." *C.O. 5 No. 752.* But appeals for relief from the annoying tithes were ineffective, since the Church of England had "very few or no advocates in either House" of the legislature. *C.O. 5 No. 10.* Governor Shute issued an order to the magistrates of the town of Marblehead, June 22, 1722, forbidding them to collect the taxes for the benefit of the churches. W. S. Perry, *Historical Collections Relating to the American Colonial Church* (1870-1878), III, p. 140.

The Puritan régime, although dominated by a Calvinism which knew only the sovereignty of God and hence ignored the meaning of popular control, did much to advance the theory of contract. Both the church covenants and the compacts by which the New England towns were set up are social. They are mutual agreements to live in an ordered society, and emphasize the foundation of authority in the free consent of the people.

Although no man is constrained to enter into a church covenant, his assent once given is not revocable at his pleasure. There can be no right of secession. To the "withdrawers" from the church at Hartford in 1657, the congregation replied that their actions tended "to a breach of the peace of the churches and commonwealth." If dissenters were to be permitted to withdraw, continued the congregation, "why may not any brother when he has given offense, especially if he can procure a considerable number to join with him, rend himself from the church and shake off the yoke, ordinances and discipline, and government of Christ in his Church?" In conclusion, they remarked of the minority that "this way of theirs crosseth our first fundamental law, whereby we are bound by oath to observe the rule of discipline here in practice according to the word of God."[76] Thus the obligations of church membership are closely connected with the duties of citizenship. Once these have been assumed under compact, neither can be avoided at the pleasure of the individual.

To the social contract, or covenant by which a congregation is established, was added a further covenant between the people and the minister. At first glance, this would appear to be a contract for services in the ordinary sense of the term.[77] But the peculiar relationship between the minister and the congregation in the New England churches elevated it to the level of an agreement between the ruler and the ruled. "Either a church is bound to submit to every doctrine so dispensed by virtue of their covenant," declared Samuel Stone to his dissenting parishioners at Hartford, "or they

[76] *Connecticut Historical Society Collections,* II, p. 80.
[77] See examples in W. Walker, *Creeds and Platforms of Congregationalism* (1893).

are not obliged to submit to any doctrine propounded by their teacher. If they are not bound to submit unto their teacher when they cannot answer his reasons, they degrade him beneath the lowest member in the church."[78] These covenants were sacred and binding, and to break them was a serious offense. The right of a church to depose its minister was in theory everywhere maintained, but the nature of the covenant seemed to require that any dissolution be by mutual consent. As long as there was no means of interpreting the covenant, except by reference to the duty of man to God, the exercise of the right of deposition was bound to encounter difficulties.

To a long experience with the social contract in the form of church and plantation covenants, the New England colonists in the eighteenth century were to add a comprehensible means of interpretation. While popular rights were deemed to exist only by the allowance of God, there was no possibility of utilizing the contract to secure popular control. In theory all questions of doubt had to be resolved by divine law; in practice they had to be settled by the clergy. But when rights were conceived to have been possessed by men in a state of nature, anterior to the creation of political society, the contract appeared as a necessary medium through which might be delegated those rights which were essential to the institution of government. The colonists followed Locke in their conception of the contract, and emphasized its limited and specific nature. The natural right of enforcing the law of reason alone was given up; the natural rights reserved to the individual continued to limit the just power of the community.

The turning point in colonial political thought was reached in the writings of Wise. While new doctrines filled the air, the colonists were becoming poignantly aware of their legal rights as English subjects. Clergymen, when they sought to rejuvenate their minds by pondering the nature of the state, began to scan the records of English constitutional development with a gloss of eighteenth century rationalism. Ancient rights, long since forgotten,

[78] *Connecticut Historical Society Collections*, II, p. 76.

were recalled and brought under the protection of natural law. Jeremiah Dummer argued without success for the restoration of the old charter privileges in New England.[79] But he wrote a brief in behalf of colonial privileges which could not be traversed. Frequent clashes between the royal governors and the popular assemblies encouraged the people to study the foundations of their English liberties. Henry Care's pamphlet, *English Liberties, or the Free-born Subject's Inheritance*, was reprinted in 1721 at the shop of Benjamin Franklin's brother and brought to colonial firesides the great documents of English constitutional development. Freedom of speech and of the press was vindicated and the protection of the English law of libel obtained despite the opposition of royal governors.[80]

The restoration of the old charter privileges would have been Dead Sea fruit to a people who had progressed far beyond the political limits fixed in the earlier documents. Many of the charters were granted to trading companies. Feudal in character, they sought to adapt institutions of medieval England to colonies planted three thousand miles across the sea in a wholly new country. "Nothing better illustrates the paucity of political ideas. It was a fundamental, a fatal confusion of corporation charter and instrument of government."[81]

If the trading company charters broke down because the governmental machinery they erected was inadequate to the task they set, the proprietary charters were not less defective. These were in form and substance modelled upon English feudal grants of an earlier age. In the three lower counties which now comprise the State of Delaware, "the government of William Penn rested upon no better legal basis than the bare deeds for the soil by which it

[79] *Defense of the New England Charters* (1721).

[80] See cases in T. B. Howell, *State Trials* (1816), XIV, p. 471; XVII, p. 675. In Virginia the printing-press was not allowed until 1729. From that date until 1766 there was but one press in the colony, "and that was thought to be too much under the control of the governor." I. Thomas, *History of Printing in America* (1810), I, pp. 331-2.

[81] C. H. McIlwain, *The High Court of Parliament and Its Supremacy* (1910), p. 363.

passed from the Duke of York to Penn." This recrudescence of feudalism involved a "striking example of the confusion of ownership and jurisdiction, of a deed with an instrument of government."[82]

Upon the principle that a stream cannot rise higher than its source, the laws which were enacted in the colonies partook of the weaknesses of the charters. Fortunately for the colony of Virginia the last of the charters granted to the Virginia Company was annulled in 1624. Thereafter the colony was governed by the Crown. It had been the plan of Sir Edwin Sandys to appoint committees to compile laws for the government of Virginia. These laws were to be submitted to the king and to receive the assent and ratification of the colony.[83] The liberal views of Sandys did not prevail, and the dissension within the Virginia Company led directly to the revocation of the charter. From the time the king took the colony into his royal protection the laws were administered in his name to the satisfaction of the settlers. By 1642 the one thing most feared in Virginia was the restoration of company rule.[84]

In marked contrast to the orderly development of law in Virginia, the legal system of New England was chaotic. Laws in the New England colonies of the seventeenth century meant usually the local regulations. Indeed, there was some disposition on the part of the clergy to refuse the term law to anything except the injunctions of Holy Writ. At the time the Massachusetts Body of Liberties was compiled, John Cotton declared that he should not call them laws, because God alone has the power to make law, but conventions between men.[85] Thus he held the medieval notion of law as the command of God. Probably because of this view, the general court did not enact the Body of Liberties but passed them in the form of recommendations.

[82] McIlwain, p. 364.

[83] *Records of the Virginia Company* (ed. Kingsbury), I, pp. 394-5.

[84] *Journal of the House of Burgesses of Virginia, 1619-1658/9*, pp. 68-9. See also *Calendar of State Papers, Colonial, 1574-1660*, pp. 73-4, 116, 136.

[85] P. S. Reinsch, *English Common Law in the Early American Colonies* (1899), p. 14. Winthrop in defining the rule of Scriptures, said: "That though the matter of the Scripture be always a rule to us, yet not the phrase." Winthrop, *Life and Letters*, etc., II, p. 275.

The English common law at the outset was not highly regarded in New England, although it was followed generally in the middle and southern colonies. Many of the colonies developed great originality in legal conceptions, departing widely from the settled theories of the common law. The first charter of Virginia undertook to assure the colonists the protection of the common law equally with the inhabitants of England. At the same time, it must not be supposed that this declaration was of any importance in maintaining the rights of English subjects. The controversy between Dr. Child and the Massachusetts government was primarily due to the refusal of the magistrates to dispense justice according to the laws of England. Local regulations were preferred in New England, although they innovated upon and departed from the models of the common law.

The arbitrary government of Andros did more than anything else to introduce a knowledge of the common law into New England. A genuine admiration for the system sprang up when it was realized that its principles contained safeguards against governmental tyranny. The writ of habeas corpus became especially desirable to a people who were told that "the king's subjects in New England did not differ much from slaves, and that the only difference was, that they were not bought and sold."[86] The Habeas Corpus Act of 1679 did not, however, extend to the colonies. The only way the colonists could obtain the benefits of a writ of habeas corpus was to assume that it was part of the common law and include it in their court procedure. The right of the colonists to a writ of habeas corpus was everywhere made to rest upon the common law, except in South Carolina which reenacted the English statute.[87]

In 1720, the extension of the common law to the colonies was affirmed by Mr. West, legal adviser to the Board of Trade. "The common law of England," he said, "is the common law of the plantations, and all statutes in affirmance of the common law, passed in England, antecedent to the settlement of a colony, are in

[86] *Andros Tracts,* I, p. 82.
[87] A. H. Carpenter, "Habeas Corpus in the Colonies," *American Historical Review,* VIII, p. 26.

force in that colony, unless there is some private act to the contrary, though no statutes, made since those settlements, are in force, unless the colonies are particularly mentioned. Let an Englishman go where he will, he carries as much of law and liberty with him, as the nature of things will bear."[88] Soon thereafter the colonists were asserting the possession of the laws of England as a right. In 1728, Daniel Dulany the elder published his pamphlet on *The Right of the Inhabitants of Maryland to the Benefit of the English Laws*. At the same time, as chairman of the committee on laws, he reported to the lower house of the Maryland legislature on the form of oath to be taken by the judges. His position was that it was "a truth not to be denied with any show of reason that the benefit of the laws of England statute as well as common is the undoubted right of the people of Maryland, and that their representatives could not be guilty of anything more destructive to the rights and liberties of those who have entrusted them, more inconsistent with their own duty or more base and treacherous than to give up or consent to impair or lessen that right."[89] It should not be overlooked that Dulany spoke of the benefits of the laws of England. British liberties were coming to be defined in terms of laws which neither king nor Parliament had granted and of which the colonists could not therefore be deprived.

Appeals to the law of nature as the basis of rights grew more frequent as the weaknesses of the charter privileges were revealed. Acts of Parliament, although they granted rights to the colonists, could also take away these rights. Colonial statesmen looked beyond Parliament to natural rights and a law of nature superior to the laws made by man. Samuel Mulford, speaking before the New York assembly in 1714, invoked "the Law of God and Nature," as protection for the rights of the people against the unjust attitude of the customs officials. The law against which Mulford complained was, he admitted, "settled upon the subject by act of Par-

[88] G. Chalmers, *Opinions* (1858), p. 206.
[89] *Maryland Archives* (1916), XXVI, p. 184.

liament." But his contention seemed to him none the less valid, because he believed the law contravened his natural rights.[90]

Borrowing from Grotius and his successors the idea that every individual possesses certain moral qualities, or natural rights, deduced by reason from human nature and existing prior to the creation of all states, the colonists asserted that the protection of these rights was the duty of the state. Happily they were able at the moment to describe these natural rights in the fundamental common-law rights which the struggles between the courts and the Stuart kings had shown might be maintained in the courts even against the king. These rights were so fundamental to Englishmen that they could not be altered or abridged by the king. "By a natural transition, the common-law limitations upon royal authority became natural limitations upon all authority; the common-law rights of Englishmen became the natural rights of man."[91]

From the pulpits of the dissenting clergy in New England came the most fruitful developments of the concept of natural law. Following in the footsteps of John Wise, the ministers broadened the meaning of the law of nature and gave to it new adaptations. Much diversity of opinion arose as to the identity of natural and divine law. Solomon Williams told the legislature of Connecticut in 1741 that "there never was or can be any wisdom among men, but what is communicated from God; nor is there any law of nature, or rule of natural and moral wisdom, which we speak of as implanted in the mind of man, but what is found in the Bible, and cultivated and improved by that Revelation."[92] This narrow view of natural law did not command universal assent; men soon began to distinguish between the law of God and the law of nature. Although disapproving this tendency in political thinking, the clergymen were obliged to recognize its existence. Nathaniel Potter of Brookline remarked in a sermon of 1758: "But admitting (what is contrary to Scripture, reason, and the common sense of mankind, and in-

[90] J. T. Adams, *Provincial Society* (1927), p. 277. The speech of Mulford will be found in *C.O. 5 No. 1051.*
[91] R. Pound, *The Spirit of the Common Law* (1921), pp. 89-90.
[92] *Election Sermon* (1741), p. 18.

volves in it an idea of God utterly unworthy a wise and good governor), that the whole frame of nature is ruled and managed by certain invariable laws which omnipotence itself cannot enforce or suspend." Before the law of nature was generally asserted as a limitation in behalf of colonial rights upon the acts of Parliament, it was fully discussed in the New England pulpits.[93]

Clerical homilies were directed toward the political education of the rulers. Government, "abstractly considered, and not as to any particular form of it," the ministers continued to regard as divinely ordained.[94] But "it was never the design of God that any one model should universally obtain amongst mankind."[95] The great end of government, they admitted, is not to magnify the glory of God but to promote the good of the subject. Religion finds its legitimate place in enlightening the rulers. "If religion rule in the hearts and lives of the rulers," declared Benjamin Colman, pastor of the Brattle Street Church, "God will have the glory, and the people be made happy."[96]

A new test of fitness for public office was proclaimed. "Piety alone won't do," said the Reverend James Allen of Brookline, "for then every good man would be qualified to rule. . . . Great knowledge and wisdom are essential qualifications in civil rulers."[97] Nor was the knowledge expected of candidates for the council and the popular assembly to be gained by the exchange of opinions in the legislative districts. "They should know," recited another clergyman, "the law of nature and nations; the present policy and power, interest and course of the world. They should have an exact knowledge of the civil and religious constitution of their country, its rise and planting, changes, interests and the like. . . ."[98] This standard demanded much of legislators who

[93] The whole question is admirably discussed in Baldwin, *The New England Clergy and the American Revolution, passim.* See also B. F. Wright, Jr., "American Interpretations of Natural Law," *American Political Science Review,* XX, pp. 524-47.

[94] W. Welsteed, *The Dignity and Duty of the Civil Magistrate* (1751), p. 10.

[95] J. Allen, *Magistracy an Institution of Christ upon the Throne* (1744), p. 25.

[96] *Government the Pillar of the Earth* (1730).

[97] Allen, p. 36.

[98] S. Fisk, *The Character of the Candidates for Civil Government* (1731).

scarcely a decade before had been described as men of "small fortunes and mean education."[99] Ranging widely over the whole field of political theory, the New England clergy contributed especially to the development of the theories of natural law until these were taken over by the revolutionary agitators.

It was James Otis, in his argument of February 1761 against the writs of assistance, who crystallized into constitutional doctrine the political thought of the colonies. Otis argued that it was a matter of indifference whether the writs were authorized by act of Parliament, since such an act would be against both the constitution and natural equity and therefore void. "If an act of Parliament," he said, "should be made in the very words of this petition, it would be void. The executive courts must pass such acts into disuse."[100]

Although Otis argued for a theory of the British constitution which had been entirely discarded in England, he furnished colonial statesmen with a basis for resistance to the demands of Parliament. His argument was constitutional in nature, and involved the problem of sovereignty. He envisaged the transformation within the British constitution of the common-law rights of Englishmen into the natural rights of man, but he also saw these natural rights as limitations upon the authority of government. Finally he saw in the courts an organ of control within the government. Otis thus gathered up into his argument the essential elements in colonial political thought since the time of John Wise.

Political thought in America was beginning to find a broad foundation of its own. Clergymen joined with the lawyers in an effort to justify the law of nature as a legal restraint upon authority. In their demonstration, they claimed the law of nature to have been engrafted into the British constitution. This line of reasoning squared with the thinking of many of the Whig statesmen in England, but it accepted the notion of the supremacy of Parliament. That is to say, the argument as outlined by James Otis and Daniel

[99] See the Memorial of Governor Shute to the King (1723). Reprinted in Perry, III, pp. 121-6.

[100] J. Quincy, *Massachusetts Reports, 1761-1772*, p. 474.

Dulany admitted the authority of Parliament over the colonies but sought to establish the principle that there were some things Parliament could not do.

The immediate effort of Dulany and Otis was to create an exception in behalf of taxation from Parliamentary control. Otis had argued in 1761 that the authority of Parliament was limited by the law of nature, and that the courts must refuse to enforce an act contrary to natural law, but as a practical proposition he saw no way in which this could be done. Further reflection convinced him that "let Parliament lay what burdens they please on us, we must, it is our duty to submit and patiently bear them, till they be pleased to relieve us."[101] Dulany was far more subtle, and sought to draw a line "between such acts as are necessary, or proper, for preserving or securing the dependence of the colonies, and such as are not necessary or proper for that very important purpose." Acts of the former sort were wholly within the authority of Parliament. "This authority," said Dulany, "results from and is implied in the idea of the relation subsisting between England and her colonies." He was clearly of the opinion that Great Britain was the superior and the colonies the inferiors in this relationship. But he argued that "when powers, compatible with the relation between the superior and the inferior, have, by express compact, been granted to, and accepted by the latter, and have been, after that compact, repeatedly recognized by the former . . . the authority of the superior cannot properly interpose, for by the powers vested in the inferior is the superior limited." This, in his judgment, was the situation between Great Britain and the colonies. "By their constitutions of government," he concludes, "the colonies are empowered to impose internal taxes. This power is compatible with their dependence and hath been expressly recognized by British ministers and the British Parliament upon many occasions; and it may be exercised effectually without striking at or impeaching in any respect the superintendence of the British Parliament."[102]

[101] *Rights of the British Colonies Asserted and Proved* (1764), p. 49. See also Otis, *Vindication of the British Colonies* (1765), pp. 4, 18-19.

[102] *Considerations on the Propriety of Imposing Taxes on the British Colonies for the Purpose of Raising Revenue By an Act of Parliament* (1765), p. 15.

The position of men like Dulany and Otis afforded no remedy against an oppressive Parliament. The repeated rejections of colonial remonstrances indicated a firm determination on the part of Parliament to persist in a course which the colonists considered a violation of their rights under the law of nature and the fundamental law of England.[103] Colonial statesmen therefore altered the grounds of their argument and challenged the doctrine of the unity of the empire. By resorting to the theory of contract they sought a more radical construction of imperial organization; they defined the British Empire in terms of a commonwealth of nations.

The germ of this idea was contained in the declaration of Stephen Hopkins of Rhode Island, who conceived the empire to be "an imperial state, which consists of many separate governments, each of which hath peculiar privileges." In this state, "no single part, though greater than another part, is by that superiority entitled to make laws for, or to tax such lesser part."[104] Governor Hopkins was not, however, prepared to pursue to its logical conclusion the line of inquiry he had begun. On the contrary, he turned back to the accepted notion that "some supreme and overruling authority, with power to make laws and form regulations for the good of all, and to compel their execution and observation," must exist. This "every man of the least knowledge of the British constitution will be naturally led to look for, and find it in the Parliament of Great Britain."[105]

The notion of Hopkins, although incompletely phrased, led beyond mere controversy over the right of taxation to the location of the ultimate source of political power. Insofar as he was arguing for a commonwealth of nations, the Rhode Island governor presented an idea which appealed only to the most radical reformers in England. John Cartwright, who had been in America, was the first Englishman to develop the line of thought opened by Hopkins. Cartwright's pamphlet was reprinted at Philadelphia in an effort

[103] C. H. McIlwain, *The American Revolution* (1923), p. 158.
[104] *Rights of the Colonies Examined* (1764). Reprinted in *Rhode Island Records*, VI, pp. 424-5.
[105] *ibid.*, p. 420.

to persuade men "that not only in taxation, but in trade and manufactures and government, the colonies are entitled to an entire independence on the British Legislature, and that it can only be by a formal declaration of these rights, and forming thereupon a friendly league with them, that the true and lasting welfare of both countries can be promoted."[106] Cartwright was wholly without influence in England but he supplied John Adams with the idea of distinct states united in the person of one king which adorns *Novanglus*.[107]

In the series of papers which Adams wrote supporting the colonial contention it is apparent that the theory of the empire advanced involves the idea of allegiance. Adams and his followers argued that the colonies were not part of the realm, and therefore "the supreme power in the kingdom is not upon these principles supreme over us." At the same time, the colonies were "within the dominion rule or government of the King of Great Britain."[108] The king was the chief tie which bound the empire together, and he was "King of Massachusetts, King of Rhode Island, and King of Connecticut," as well as King of Great Britain and Ireland, and John Adams expressed the pious wish that his majesty might be graciously pleased to assume these titles.[109] In accordance with the charters received from him and of other express or implied grants, a contractual relationship was established between the king and his colonial subjects. Allegiance was therefore owing to the king, although not to Parliament.

Adams and the New England patriots were not alone in developing the idea of a commonwealth of nations and in asserting the contractual nature of the relationship between the king and his American subjects. James Wilson in Pennsylvania and James Iredell in North Carolina wrote in similar vein in the unavailing

[106] *American Independence the Interest and Glory of Great Britain* (1774).
[107] J. Adams, *Works* (1850-1856), IV, pp. 105-7, 113, 114. See also the letters written by Daniel Leonard during the winter of 1774-1775 and published under the title of *Massachutensis* (1776). These were perhaps the ablest pamphlets written in opposition to the popular movement.
[108] *ibid.*, p. 107.
[109] *ibid.*, p. 114.

search for a formula which would reconcile the conflicting theories of the British constitution.[110] Thomas Jefferson sought to persuade the Virginians "that the relation between Great Britain and these colonies was exactly the same as that of England and Scotland after the accession of James and until the union, and the same as her present relations with Hanover, having the chief executive, but no other necessary connection." In a thin pamphlet which was in many respects a rehearsal for the Declaration of Independence, he set forth the grievances of the colonists.[111] Nevertheless, "imperial federation, not independency or democracy, was in Jefferson's mind."[112]

Pulpit oratory conspired with political eloquence to enforce the idea of the contractual nature of the relationship between king and subjects. "What but compact," asked the Reverend Ebenezer Devotion in 1766, "annexes the colonies to the British Empire rather than to the States of Holland?" With the early church covenants in mind, clergymen dwelt at length on the sacred nature of the compact between king and people. But they did not teach the doctrine of passive obedience. The breaking of contracts, whether by subjects or rulers, was defined as treason. "We may and ought to resist," declared John Lathrop, "and even make war against those rulers who leap the bounds prescribed them by the constitution." With Lexington and Concord a few days behind him, the Reverend John Cleaveland concluded that the compact was shattered and the subjects of the king were absolved from their allegiance. "King George the Third, adieu!" he cried. "No more shall we cry to you for protection. . . . Your breach of covenant; your violation of faith . . . have dissolved our allegiance to your Crown and Government. . . . O George! See thou to thine own house."[113]

[110] Wilson, III, pp. 199-246; G. L. McRee, *Life and Correspondence of James Iredell* (1858), I, pp. 207 *ff.*

[111] *Summary View* (1774). Reprinted in *American History Leaflets*, No. 11. The argument of John Dickinson will be found in *The Power of Great Britain over the Colonies in America* (1774).

[112] E. Channing, *History of the United States*, III, p. 183.

[113] The appendix of Miss Baldwin's book contains excerpts from a number of sermons which are typical examples.

Controversy must be endless while men differ in the grounds of their argument. The supremacy of Parliament, which was fundamental to the thought of the statesmen at Westminster, was utterly rejected in the colonies. Insistence upon the doctrine of parliamentary supremacy by British political leaders appeared to the colonists to be nothing less than a conspiracy to subject them to a jurisdiction foreign to their constitution and unacknowledged by their laws. George III, by giving his assent to the "acts of pretended legislation" by Parliament, had broken the compact between king and people. His subjects were therefore absolved from all allegiance to the British Crown.[114]

The Declaration of Independence marked the close of the controversy; the colonists had decided to resort to "the extreme medicine of the constitution."[115] But as they exercised the right of revolution according to the teachings of John Locke, they continued to think in terms of the social contract philosophy of the new governments which must replace those which were destroyed. Governments derive their just powers from the consent of the governed and exercise them in the nature of a trust for the public good. This idea developed by Thomas Jefferson provides perhaps the most lucid statement ever written of the theory of popular sovereignty.

It was a very practical conception of sovereignty that pervaded American political thought. As a result of more than a century of town meetings with their instructions to representatives in the colonial assemblies, the idea emerged that the people as a whole have in their hands a power which can be counted upon to secure obedience. The Continental Congress recognized the existence of this power when its members refused to enter upon the important

[114] Thomas Paine's *Common Sense* first appeared in January, 1776, and asserted in striking phrases the right of revolution. Opposition to the revolutionary movement was voiced by J. Boucher, *A View of the Causes and Consequences of the American Revolution* (1797). A summary of this book is given in Merriam, pp. 64 *ff.*

[115] On the question of the precise moment when the American Revolution began, see McIlwain, *The American Revolution*, pp. 6 *ff.* See also C. Becker, *The Declaration of Independence* (1922), and H. Friedenwald, *The Declaration of Independence* (1904).

question of independence until they had obtained proper instructions from the popular assemblies which had elected them.[116] Even in the Convention of 1787 the Delaware delegates at first objected to considering the proposals for a new constitution because their credentials did not allow them to go so far.[117] It was this same belief in the supreme authority of the people which led James Madison to argue for the ratification of the Constitution through popular conventions.

In order to discover the origins of this power the American colonists in 1776, like their English forebears in the previous century, turned back to the state of nature. "It appears to me," wrote a correspondent to Samuel Adams, "if there is any force in the late acts of Parliament, they have set us afloat; that is, have thrown us into a state of nature. We now have a fair opportunity of choosing what form of government we think proper, and contract with any nation we please for a king to reign over us."[118] The formation of new constitutions was regarded as the work of a people convened in the state of nature who had "deputed a few fathers of the land to draw for them a glorious covenant."[119] If it could be argued that the condition of Massachusetts, or any other of the thirteen colonies, contrasted strangely with eighteenth century conceptions of the state of nature, the ready answer was that the device served to reveal the people as the source of supreme power.

The theory of popular sovereignty embraced clearly enough the idea that the people have the right to alter their government. In the state of nature this essential attribute of sovereign power was discernible in the hands of the people to a greater degree than in civil society. Not everyone agreed with the Lockean view that the right of revolution was not to be exercised for light and transient causes; since it was thought to exist as a natural right some

[116] A. W. Small, "Beginnings of American Nationality," *Johns Hopkins University Studies,* 8th Series, p. 74.
[117] Farrand, I, p. 37.
[118] H. A. Cushing, *History of Transition from Provincial to Commonwealth Government in Massachusetts* (1907), p. 8 n.
[119] H. Niles, *Principles and Acts of the Revolution* (1876), p. 71.

thought it incapable of qualification or limitation. Hence the right of revolution came to be identified with civil liberty, as "a power existing in the people at large, at any time, for any cause, or for no cause, but their own sovereign pleasure, to alter or annihilate both the mode and essence of any former government, and adopt a new one in its stead."[120]

American ideas of popular sovereignty were decidedly more individualistic than their English prototypes. Locke insisted that the dissolution of government did not involve the dissolution of society. Moreover, he was clearly of the opinion that power does not revert to the individuals, as long as society lasts, but to the community. At least some of the colonists were not satisfied unless the individual, from whom the rights were originally granted, regained possession upon the exercise of the right of revolution. "In the present dissolution of the civil government in this province," declared a Pennsylvania patriot, "political power reverts to its first origin, the people; that is to every individual inhabitant of this colony capable of managing his own affairs. . . . It is from conventions of convenient numbers of such freemen that the first delegation of civil power can be had."[121]

What constituted a people was nowhere precisely defined by the revolutionary thinkers in America. "It was made clear by the Declaration of Independence that those in whose name it was published conceived themselves as a distinct people so far as concerned all other communities of men."[122] But the unity and solidarity which were then momentarily displayed soon disappeared, and thirteen peoples were revealed instead of one. A few years later, in the Federal Convention, Luther Martin argued that "to resort to the citizens at large for their sanction to a new government will be throwing them back into a state of nature: that the dissolution of the State governments is involved in the nature of the process: that the people have no right to do this without the

[120] Niles, p. 47.

[121] *Pennsylvania Packet*, May 20, 1776. Quoted in C. H. Lincoln, *The Revolutionary Movement in Pennsylvania* (1901), p. 23.

[122] W. A. Dunning, *History of Political Theories from Rousseau to Spencer* (1920), p. 97.

consent of those to whom they have delegated their power for 3.
State purposes."[123] In the thought of Martin, sovereign power was vested in the people of each of the thirteen States. But the essential powers had been delegated to the government of the State and could not be regained as long as the government did not become tyrannical. Supreme power, therefore, returned to the people only when government became oppressive.[124]

The argument of Martin was opposed on the floor of the convention by a more liberal view. James Wilson "could not admit the doctrine that when the colonies became independent of Great Britain, they became independent of each other." Hamilton agreed with him; "he denied the doctrine that the States were thrown into a state of nature."[125] According to the opponents of Martin, the States were considered as districts of people composing one political society. "We never were independent States," exclaimed Elbridge Gerry, "were not such now, and never could be even on the principles of the Confederation. The States and the advocates for them were intoxicated with the idea of their sovereignty."[126] The reconciliation of these conflicting views of the location of sovereign power became the great problem of the framers of the American political system.

[123] Farrand, I, p. 437.
[124] E. S. Corwin, *The Doctrine of Judicial Review* (1914), pp. 107-8.
[125] Farrand, I, p. 324.
[126] *ibid.*, p. 467.

CHAPTER II

THE BALANCE OF POWER

THE political ideal of the pamphleteers of the American Revolution was that of a balanced government. Recognizing the sovereignty of the people, they insisted that government "should be erected upon some invariable principles."[1] In order to find these principles the American colonists, unlike the Frenchmen of 1789, consulted their own political experience. Thus they imparted to the new constitutional constructions an essentially practical character.

The foundations of the American conception of a balanced government synchronize with the first settlements in the country. Although the theory of a balance of power was not clearly defined until the eighteenth century controversies between the governors and popular assembly in Massachusetts, the fundamental idea had been considered a century earlier. In 1631 the inhabitants of Watertown objected to a tax of £8 levied by the magistrates, on the ground "that it was not safe to pay moneys after that sort, for fear of bringing themselves and posterity into bondage."[2] The pastor, elder, and others of Watertown, being called before the governor and assistants, said they had believed the government of Massachusetts to be "no other but as of a mayor and aldermen, who have not power to make laws or raise taxations without the people." The magistrates convinced them that the "government was rather in the nature of a parliament" which had complete power of taxation.[3]

It was not long, however, before further protests were made by

[1] *The People the Best Governors* (1776); H. A. Cushing, "The People the Best Governors," *American Historical Review*, I, pp. 284 *ff*.
[2] G. H. Haynes, "Representation and Suffrage in Massachusetts, 1620-1691," *Johns Hopkins University Studies*, XII, p. 17.
[3] Winthrop, *History*, I, p. 84.

the freemen. As the general court was about to assemble in 1634, a group of the freemen "desired a sight of the patent," and finding that by it all laws were to be made by the general court, they proclaimed their grievances. At the general court, held May 14, 1634, the freemen issued a declaration of rights and at the election refused to continue John Winthrop as governor. It was then enacted that there should be four general courts held each year. One of these was to be a court of elections at which all freemen voted; at the other three courts two or three delegates were to be chosen from each town to attend. The general court, including the governor, assistants and deputies, was to have full power in making laws. This was in fact a popular revolution whereby the legislative power was transferred from the magistrates to the general court.[4]

It was by no means the intention of John Winthrop and his followers in 1634 to permit the creation of a democratic form of government. The magistrates acquiesced in the demands of the freemen, secure in the knowledge that the assent of seven of their number was required by the patent to every law. This negative voice of the magistrates was the essential balance which was to preserve and stabilize the government. "If the negative voice were taken away," said Winthrop, "the government would be a mere democracy, whereas now it is mixed. Democracy is defined as a form of government in which the power and the administration thereof are in the people. If it be in the deputies it will be in the people, for the deputies are the representatives of the people. If we change from a mixed aristocracy to a democracy, we should have no warrant in Scripture for it; there was no such government in Israel."[5]

The theory of Winthrop was tested in the famous case of Sherman *v.* Keayne, which dragged through the Massachusetts courts from 1636 to 1644. Because a majority of the magistrates could not agree with a majority of the deputies, no verdict could

[4] Haynes, p. 18; Winthrop, *History*, I, pp. 152-3; Winthrop, *Life and Letters*, II, p. 113.
[5] Winthrop, *History*, II, p. 427.

be rendered. Although the case stood at a deadlock, it was decided in 1644 that the magistrates and the deputies should thereafter deliberate separately. "It was ordered that the court should be divided in their consultations, the magistrates by themselves, and the deputies by themselves; what the one agreed upon they should send to the other, and if both agreed, then to pass."[6] Bicameralism was thus introduced in Massachusetts in the effort to maintain a balance of power in the government. The deputies became "the democratic branch of the legislature," while the council took on the functions of an upper house, although still retaining its separate position as an executive advisory body.[7]

In Virginia when the government passed into the hands of the king upon the annulment of the charter, the popular assembly was retained. The governor was directed in 1629 to continue the annual assembly to ordain laws, which must be temporary and changeable at the king's pleasure.[8] This institution was reaffirmed in the instructions to Governor Berkeley in 1642 and remained an integral part of the Virginia legislature, although a negative was vested in the governor.[9] Popular rights were repeatedly asserted in Virginia against the power of the king. In 1635 a popular revolution forced the return of Governor Harvey to England, but the most important event in the struggle between the people and the royal governor was the uprising in 1676 known as Bacon's Rebellion.[10] The causes of this revolt lay in the bad government of the colony under Governor Berkeley, but the specific complaints emphasized the disregard of the popular will. Among the grievances recited were the continuance of the same assembly over a period of years

[6] Winthrop, *Life and Letters,* II, Chap. XVIII.

[7] F. L. Riley, "Colonial Origins of New England Senates," *Johns Hopkins University Studies,* XIV, p. 113. An act was passed in Connecticut on February 5, 1644/5, granting to each branch of the legislature a negative upon the actions of the other. *ibid.,* p. 129.

[8] *Calendar of State Papers, Colonial, 1574-1660,* p. 100.

[9] *Virginia Magazine of History,* II, pp. 281-2.

[10] *Calendar of State Papers, Colonial, 1574-1660,* pp. 212-13, 216, 221, 245, 286, 311. The papers relating to Bacon's Rebellion are to be found in the British Museum, Egerton MSS. 2395. Folio 539 *ff.* contains the statements of Bacon and Governor Berkeley and the adherence of the people to Bacon.

without any intervening elections and the continuance in office for prolonged periods of the sheriffs who should have been chosen annually.[11] Although the circumstances attending Bacon's Rebellion are somewhat obscure, there was clearly present the idea that the people possessed the power to redress the balance between popular rights and royal prerogative.

Representation was, of course, the great agency through which popular rights were voiced in the colonial governments. In the early days of Massachusetts, participation in government was restricted to church members; citizenship was made an incident of church membership.[12] In Virginia the suffrage was granted to all freemen from 1619 to 1654, when property qualifications were introduced.[13] It is important to observe, however, that in both colonies popular representation was upon occasions perverted. The Massachusetts theocrats were not less guilty than Governor Berkeley of seeking to control for selfish purposes the representation of the people. The establishment of genuine popular representation in the colonies was not accomplished until the franchise was broadened at the end of the seventeenth century.

The improvement of representative government in the colonies was a part of the general movement which culminated in the English revolution of 1688. As a result of this movement, the colonists gained political self-consciousness. They grasped the enormous possibilities for local self-government that lay in the broadening of the franchise and in the grant of representation in the colonial assemblies. Following the revolution in England, changes were made in the suffrage laws of every one of the colonies except Rhode Island.[14] Manhood suffrage upon the basis of a property qualification almost everywhere displaced the old religious qualifications which restricted the franchise to church members. There were a few exceptions; Catholics were barred from voting in Virginia and the franchise in South Carolina was

[11] *Virginia Magazine of History*, II, pp. 170-2; *Calendar of State Papers, Colonial, 1574-1660*, pp. 392, 398, 399, 437.
[12] Haynes, p. 385.
[13] P. S. Flippin, *The Royal Government in Virginia* (1919), pp. 190-1.
[14] Adams, *Provincial Society*, p. 19.

limited to communicants of the Church of England. Pennsylvania required a belief in Christ as the Saviour of the world and imposed the further restriction upon officeholders that they should believe in a future state of rewards and punishments.

The property qualification was by no means uniform throughout the colonies. Massachusetts and Connecticut required the possession of a freehold estate of the value of forty shillings per annum or of a personal estate worth £40 sterling. New Hampshire had a similar qualification in landed property but required that the estate be worth £50 if in personal property. The requirement in New York was a freehold worth £40. Fifty acres of land or an estate of the value of £50 admitted to the franchise in New Jersey and Pennsylvania, and the same acreage of land or a personal estate of £40 sufficed in Delaware and Maryland. Virginia maintained as a rigid requirement the ownership of a landed estate. In 1736 this was established as one hundred acres, or twenty-five acres with a house in the county. South Carolina gave the suffrage in 1704 to all persons possessing fifty acres freehold or a personal estate of £10, but in 1721 extended the privilege to all who owned fifty acres of land or paid a tax of twenty shillings per annum. As a rule, the requirements were still higher for an officeholder than for a voter.

It is well known that the broadening of the franchise did not bring large numbers of voters to the polls.[15] There was always a much larger proportion of the population entitled to exercise the franchise than appeared on the election days. In some of the colonies the representation was manipulated to keep control in the hands of the tidewater counties. But apart from this injustice, it cannot be said that the limitations upon the franchise were burdensome. There was no large class among the population which had political aspirations and which was unable to express them. Compared with the conditions under which the franchise was exercised in England, the colonial restrictions were mild. They did not

[15] A. E. McKinley, *The Suffrage Franchise in the Thirteen Colonies* (1905), pp. 356, 378, 420, 487. See also C. F. Bishop, *History of Elections in the American Colonies* (1893).

certainly hinder the exercise of the right of popular representation, which by the end of the seventeenth century was recognized in the legislative branch of the government in all the colonies.

Representation in theory and practice departed from the English model when applied in the colonial legislatures. The first representative assembly in Virginia, following the example of Parliament in an earlier day, merely petitioned for a redress of grievances.[16] But the later assemblies, especially in New England, came to regard themselves as the custodians of popular rights under the charters. In fiscal matters they went so far as to assert their possession of the whole power of the people. By the eighteenth century, representation was regarded in America as a substitute for legislation by direct action of the people.

The responsibility of representatives to their constituents was secured through annual elections and the practice of instructions. In Massachusetts "when towns began to send deputies to the general court, they treated their deputies as they had treated their selectmen, and not only voted instructions to govern their conduct in the colonial assembly but also required the deputy upon his return from Boston to make a report concerning the business which had been transacted in the general court."[17] From New England the practice of voting instructions spread to the other colonies.[18] It was provided in the fundamental laws of West Jersey in 1676.[19] In the southern colonies instructions were not voted until after 1765, although the right of petition was granted and freely exercised from a much earlier date.[20] Few statements of the right of instruction are more complete than that of Pennsylvania, where it was boldly asserted that "the right of instructing lies with the constituents and them only, that the representatives are bound

[16] *Journals of the House of Burgesses of Virginia, 1619-1658/9,* p. 6.
[17] K. Colegrove, "New England Town Mandates," *Publications of the Colonial Society of Massachusetts,* XXI, pp. 411 *ff.*
[18] Lincoln, *The Revolutionary Movement in Pennsylvania,* pp. 23 *ff.* See also T. Jefferson, *Notes on Virginia* (1781), J. A. C. Chandler, "Representation in Virginia," *Johns Hopkins University Studies,* XIV, pp. 272-3, and E. I. Miller, *The Legislature of the Province of Virginia* (1907), p. 51.
[19] *New Jersey Archives,* 1st Series, I, p. 264.
[20] Colegrove, p. 422.

to regard them as the dictates of their masters and are not left at liberty to comply with them or reject them as they may think proper."[21]

The right of the people to instruct their representatives is a distinguishing characteristic of the colonial theory of representation. No right was more jealously guarded. Local self-government seemed to the colonial mind to demand that representation should always be under the close scrutiny of the community. It was believed that popular privileges remained safe while they were delegated to representatives elected annually and subject to the restraints of mandates from the electorate. The first duty of the deputy was to obey the instructions of his constituents. The Massachusetts House of Representatives told Governor Burnet in 1728 that "they did not dare come into" an act fixing upon him a permanent salary "without the special orders of their constituents."[22] Burnet failed to grasp the limitations which circumscribed the authority of the deputies. Construing the terms of their charter as a mandate sufficient to warrant a general course of conduct, he rejoined: "You have now fully explained your mind, which amounts to allowing that you may be lawfully compelled by your constituents to a thing, though it should be against your own declared judgments."[23] Burnet was wrong; the deputies were within their rights in blocking legislation for a permanent salary while they were uninstructed by the electors. It might be said that the colonial legislator owed his constituents his industry, but not his judgment.

Insistence upon the right of instruction was entirely consistent with the principles established by the political revolutions in England during the seventeenth century. For along with the doctrine of the supremacy of Parliament was developed the theory that government rests upon the consent of the governed. The two ideas

[21] Lincoln, p. 244. For examples of instructions, see *Votes and Proceedings of the House of Representatives of the Province of Pennsylvania,* V-VI, *passim.*

[22] *Collection of the Proceedings of the Great and General Court . . .* (1729), p. 75.

[23] *ibid.,* p. 80.

were regarded as complementary by the Whig apologists for the revolution of 1688, who discussed the responsibility of members of Parliament to their constituents. "It is reasonable to give them instructions," said DeFoe of the members of the House of Commons, "and though they are not conditionally chosen as to their instructions, yet they ought in honor to think themselves under equal obligation to stand by those instructions."[24] The Whig politicians did not, however, take into account the enormous vested interest involved in the "rotten borough" system which was to alter the English theory of representation.

Politicians of every shade of opinion in England in 1688 condemned the existing borough franchise. Shaftesbury, the patron of Locke, in an unpublished paper declared "that the Parliament, as now constituted, is no equal representative of the people; in that several boroughs so inconsiderable that they contain not above three or four houses, send each of them two representatives to Parliament, whilst others (which contain an hundred times their number of houses, people, trade, and wealth) have no representative at all in the management of public affairs." But the problem of "rotten boroughs" is not insoluble, and Parliament is invited "to look into the constitutions and customs of such boroughs which have the right to elect, and which, in several particulars, seem to require a touch of the supreme authority to set them right." For "the Parliament of England is that supreme and absolute power which gives life and motion to the English government."[25] The reasonableness of the "rotten borough" system could not be sustained, although the institution itself continued to flourish. The inadequacies of parliamentary representation noted by Shaftesbury

[24] *Original Power of the People of England* (1702). "I shall take it for granted, and agree with anybody in this: That it is the undoubted right of the people of any free nation, but particularly of the three Kingdoms of Scotland, England and Ireland, to present their grievances to their respective authorities, be it King or Parliament or both, and to do it by petition, address, or any other way within the limited prescription of the law." DeFoe, *Two Great Questions Considered* (1707), p. 5.

[25] *Some Observations Concerning the Regulation of Elections for Parliament.* Reprinted in Somers Tracts, VII, pp. 396 *ff.*

and Locke, instead of being cured, were made to serve as the basis for the system of representation.

The perpetuation of the "rotten borough" system was due to royal interference with the parliamentary elections. It was not difficult through the proffer of places of honor to members from the "rotten boroughs" to bring them to the side of the king. This practice, according to one pamphleteer, began with William III who, in order to gain the votes of money needed, was induced "to lay the foundation for softening the inflexible spirit of an honest representation of the people, and securing their future compliance with the measures of the court. Succeeding reigns hath reduced to a system what he began; till at length the voice of a standing majority of the Commons Elected hath been brought into perfect unison with Ministers of State."[26] When the king failed to secure his interest by preferments to places of honor, his ministers could obtain the results desired through the liberal use of funds.[27] By 1780 it was possible to say that "*influence* has now given to the Crown that power which it formerly derived from prerogative."[28]

The theory of representation in England reflected the political practice of the time. Beginning in the *Discourses Concerning Government* of Algernon Sidney and culminating in the speech of Edmund Burke to the electors of Bristol in 1774, the idea was

[26] *Present State of the Bodies Elective* (1716). See also *Benefits Gained by the Late Septennial Parliament* (1722). In the royal colonies it was often the practice for the governor to influence the elections of members of the popular assemblies. "An Account of the Present State and Government of Virginia," *Massachusetts Historical Society Collections*, 1st Series, V, p. 140.

[27] *The Freeholder's Plea against Stockjobbing Elections of Parliament Men* (1701), *Honest Advice to the Electors* (1708), and many similar pamphlets of the time give abundant evidence of the corruption in the elections to the House of Commons during the reign of William III. The great number of placeholders in Parliament led to demands for a law limiting the number of places of honor and trust that might be held by members of the House of Commons. This was opposed by the Whigs on the ground that it would pave the way for a Tory majority and the interposition of French influence. *An Impartial Inquiry* (1739). A "place-bill" was introduced and passed in the House of Commons, but was defeated in the House of Lords in 1741. *History of the Last Sessions of Parliament* (1742); *Parliamentary History*, XII, p. 1.

[28] *Inquiry into the Influence of the Crown over Parliament* (1780).

growing that after the representatives had been returned and had taken their seats in the House of Commons they ought not any longer to have a dependence upon those they represented. To DeFoe it seemed that the electors were not "choosing men to sit in Parliament as persons to act for you only whom they represent; but they are representatives in a double capacity. Separately considered, every member represents the people who choose him, and all together represent the whole nation. Their right to sit is separately devolved; but their right to act is conjunctively inherent, every man represents the whole and acts for the whole, although he is sent but from part."[29] The idea of a restricted mandate was passing away and soon disappeared altogether. "As members of this House," Sir William Yonge told his colleagues in 1734, "they ought to drop not only their dependence upon, but even their concern for the particular city they represent, in order to concur with the rest of the members in what they judge to be for the general interest of the nation."[30]

The language of Burke is not more conclusive. Instructions to representatives in Parliament by the electors were barred on the ground that they would hamper the representatives in the discharge of their lawful duties and, by restricting the freedom of parliamentary debate, "tend to frustrate their intentions of acting in their legislative capacity for the good of the whole community, according to the best of their own consciences and judgment." The mandates of electors could not embody a reflex of opinion throughout the country. Indeed, they "might oftentimes be only the result of a few turbulent spirited men in a city, county or borough."[31]

The divergence between the English and colonial theories of representation was most completely marked by the adoption in the colonies of the requirement that a representative must be a resident of the district he represents. In Massachusetts, by act of the assem-

Residence requirement

[29] DeFoe, *The Freeholder's Plea*, etc., pp. 26-7.
[30] *Parliamentary History*, IX, p. 451.
[31] *A Hint Upon Instructions from the Electors to Their Representatives* (1742). This pamphlet refers to the delegation theory of representation as "a new sort of political doctrine strenuously enforced by the modern malcontents."

bly in 1693, it was directed that representatives must be residents in the towns for which they were chosen. With few exceptions, the same practice was followed in the other colonies. By the time of the war for independence, the idea "was firmly planted that no man, in any colony, regardless of wealth, social position, or attainments could as efficiently serve as a representative in the colonial legislature for a given district as one who lived within that district and understood its people and its problems."[32]

The residential requirement in England for members of the House of Commons had ceased to have practical application before the planting of colonies in America. As early as the reign of Henry V it had been enacted that "knights of the shire and citizens and burgesses should be dwelling and resident" within the constituencies they represented. But these laws were evaded, and long before the end of the sixteenth century had fallen into desuetude. By 1620 the laws imposing a residential requirement were so long unobserved that a committee of the House of Commons recommended their repeal. It was not until 1774, however, that Parliament acted and the statute book was cleared of all the enactments relating "to the residence of persons to be elected to serve in Parliament, or of the persons by whom they are to be chosen."[33]

Although the grant of representation in the colonial assemblies was a prerogative of the Crown, many of the colonists came to regard it as part of their British liberties. The Massachusetts Charter of 1691 gave each town two representatives, but the assembly did not hesitate by act to alter the representation. Boston was given four deputies and towns under 120 voters were limited to one deputy. No towns having less than 80 voters were obliged to send deputies and a few towns were constituted without representation.[34] Sometimes the king interfered, as in New Jersey, to alter the apportionment of representation.[35] Such royal interference was always resented and occasioned lively debates in the

[32] H. Phillips, *The Development of a Residential Qualification for Representatives in Colonial Legislatures* (1921), *passim.*
[33] E. Porritt, *The Unreformed House of Commons* (1903), I, p. 122.
[34] W. Douglass, *Historical and Political Summary* (1760), I, pp. 488-9.
[35] *C. O. 324 No. 35.*

colonial legislatures. Samuel Mulford, a turbulent member of the New York legislature, crossed the Atlantic in 1717 to complain before the Board of Trade and the Privy Council that the representation was unequal because it was not apportioned according to population.[36] A few years later the Board of Trade disallowed the South Carolina act of 1721 altering the representation of the colony. No attention, however, was paid to the disallowance; the Carolinians objected to the repeal in this way of a duly authorized statute.[37]

Political parties in the modern sense of the term did not arise in America before the end of the eighteenth century. But every colonial assembly had its party of opposition to the acts of the governor. By their control over the purse the representatives of the people sought to balance the preponderance of power in favor of the royal governors. Few men clearly understood the equilibrium of power they sought to establish, but everyone realized that the maintenance of local self-government required a balance between prerogative and popular rights.

The later colonists turned to Montesquieu as the oracle to be consulted on the subject of the separation and balance of powers. It was supposed that the writings of the Frenchman depicted the political situation in England at the time he wrote, but the assumption had little basis in fact. At the precise moment when Montesquieu was formulating his principles, the British government was assuming a form inconsistent with the doctrine of the separation of powers. Acquiescence in the appointment of members of the House of Commons to places of honor and trust by the Crown had converted the political system of Great Britain into the mixed form of government despised by Hobbes. An absolute separation between members of Parliament and places, declared one pamphleteer, is "an impossibility, owing to the nature of our govern-

[36] *Documentary History of New York,* III, p. 363.

[37] E. L. Whitney, "The Government of the Colony of South Carolina," *Johns Hopkins University Studies,* XIII, p. 49; F. Yonge, *Narrative of the Proceedings of the People of South Carolina in the Year 1719.* Reprinted in Force Tracts, II.

ment, which is mixed, and to that of mankind, who are not to be divested of their natural appetites and passions."[38]

The apparent free reign of human greed which is here envisaged is nothing less than the incipience of the party system. It is to the credit of Robert Walpole that he seized upon the idea of the utter depravity of man to establish it as a working principle of statesmanship. "Disliked by the Sovereign, as well as by the people," wrote an enemy of Walpole, "he erected an intermediate power for himself, by which he commanded both. He overawed the Nation with the power of the Crown, and he terrified the Prince with imaginary and well contrived fictions of disaffections in the subject. This method of government at once satisfied the ambition of the minister and glutted the avarice of his friends and dependents."[39] The foundations laid by Walpole were continued by the Pelhams until, by the time of Chatham, the structure of the party system was fully reared.

Party organization in the Walpole era was undoubtedly shaped through bribery and corruption. Ministerial combinations on the one hand thwarted the direction of members of the House of Commons by their constituents, and on the other hand broke down the barriers between legislative and executive power. But these innovations were regarded as evils only by the Tory opposition.[40] From this source Walpole had little to fear, as long as he could attach to the Tories the stigma of foreign intrigue and dalliance with Jacobite plots.[41] He was therefore free to consolidate his control of the government through the maintenance of a party majority in the House of Commons.

[38] *Vindication of the Honour and Privileges of the Commons of Great Britain* (1740).

[39] *The Political Conduct of the Earl of Chatham* (1769). Chatham MSS. No. 82.

[40] *An Address to the Electors* (1739); *A Letter to a Member of Parliament from a Friend in the Country* (1739); *Directions and Advice for the Choice of Members of Parliament* (1741). See also *The Danger of Mercenary Parliaments* (1722); *A Complete History of the Late Septennial Parliament* (1722); and *Benefits Gained by the Late Septennial Parliament* (1722).

[41] *An Impartial Enquiry into the Reasonableness and Necessity of a Bill for Reducing and Limiting the Number of Places in the House of Commons* (1739).

Ministerial combinations, based upon parliamentary interest, were the foundations of the cabinet system. The work which Walpole began was put to the test in 1746 by the Pelhams. In that year the failure of George II to form a ministry which had not the support of a majority in Parliament marked the downfall of personal government by the king. "Ministers are the king in this country," exclaimed the monarch in his chagrin.[42] By this remark the Hanoverian showed his wisdom and his insight. For the changes to which he stood an unwilling spectator established the ministers who could command a majority in both Houses of Parliament as the government of Great Britain. The rise of the cabinet system thus created a new organ of control which gave stability and equilibrium to the British constitution upon a principle different from that of Montesquieu.

On this side of the Atlantic, however, the significance of the changes taking place at Westminster was not perceived. Men saw the corruption of Walpole but were blind to his administrative genius. They recognized that somehow the king himself had been superseded by the ministry as the actual agency of government[43] But they still regarded the duty of the king to rule, and viewed the eclipse of royal power by ministerial groups as an aberration from the principles of the British constitution. "The people of America did not oppose the British King but the Parliament," said James Wilson after the war for independence. "The opposition was not against an unity but a corrupt multitude."[44] Across the black morass of English political corruption the principles of Montesquieu loomed to American statesmen all the more vividly. The doctrine of the separation of powers and the system of checks and balances appeared not only correct as theories but also fitted in with colonial experience.

Although the writings of Montesquieu were widely read and accepted in America as political gospel, the principles they set

[42] M. T. Blauvelt, *The Development of Cabinet Government in England* (1902), p. 177.
[43] H. J. Ford, *Rise and Growth of American Politics* (1898), p. 176.
[44] Farrand, I, p. 71.

forth were already known to the colonists. Indeed, the doctrine of the separation and balance of powers was proclaimed in Massachusetts six years before the *Esprit des Lois* saw the light.[45] In 1742, the House of Representatives in Massachusetts rejected the demands of Governor Shirley for a permanent salary on the ground that it "would greatly tend to lessen the just weight of the other two branches of the government, which ought ever to be maintained and preserved; especially since the governor has so great authority and check upon them." This was no chance remark of the deputies, for they had in view as their model the British constitution, "the strength and beauty of which chiefly consists in that mutual check which each branch of the legislature has upon the other." A similar balance of power they thought ought to be maintained in the government of Massachusetts. "There ought not to be an independency in either branch of the legislature," they concluded, "forasmuch as to be independent and arbitrary are the same things in civil policy."[46]

Although lacking in scientific precision, the political dynamics of colonial Massachusetts aimed to balance prerogative and popular rights. Practical difficulties arose because the governor and the deputies had their powers defined by different instruments. The governor was bound by his instructions while the deputies looked to the charter of 1691 for the scope and limits of their authority. On the salary question the governor could only reiterate the instructions received from the Crown; he could not coerce the popular assembly.[47] But when the deputies undertook to secure for

[45] The doctrine of the separation of powers was expounded by at least one eighteenth century writer before Montesquieu, i.e. P. de Rapin-Thoyras, *The History of England* (1732-1733). This book was known in the American colonies and was quoted by a number of the Revolutionary pamphleteers. See R. Bland, *Enquiry into the Rights of the British Colonies* (1769). Further references to the influence of Rapin's book upon the American revolutionists will be found in J. Dickinson, *Administrative Justice and the Supremacy of Law* (1927), p. 83.

[46] *C. O. 5 No. 753.*

[47] *Collection of Proceedings,* etc., pp. 13-112; G. A. Wood, *William Shirley* (1920), pp. 110-14. The Privy Council on June 26, 1729, advised Governor Burnet that he should have £1,000 sterling settled on him each year by the Massachusetts legislature. "And there is too much reason to think," the instruc-

themselves timber from lands reserved to the Crown, adjourned their sessions for several days without the consent of the governor, and sought to suspend a military officer in the service of the king, their conduct was properly restrained as an encroachment upon the prerogative.[48]

The political ideal of a balance of power among the different branches of the government was menaced by the selfish interests of the popular delegates. The same spirit of faction against which the statesmen of 1787 sought to find safeguards appeared in the colonial governments.[49] Opinion in the House of Representatives in Massachusetts was created, according to Governor Shute, "by the artifice of a few designing members, together with the insinuations of the people of the town of Boston." It was the object of these demagogues to make the country members "believe that the House is barely supporting the privileges of the people, whilst they are invading the undoubted prerogative of the Crown." Among the people he noted "a levelling spirit too apt to be mutinous and disorderly."[50] Nor was the situation different in 1728 when the people of Boston in town meeting debated the question of fixing a permanent salary. Upon this occasion, Governor Burnet deter-

1728

Difference between artful demagogues & party leaders?

tion continues, "that the main drift of the assembly, in refusing to comply with what has been so frequently and so strongly recommended to them, is to throw off their dependence on the Crown; which proceeding can in no wise be justified by their charter, and never will be allowed by His Majesty. This obstinacy of theirs has produced the final determination of laying the whole matter before the Parliament . . . if the further steps that shall be then taken in this affair should not be so agreeable to the House of Representatives as they could wish, they must consider that it is entirely owing to themselves. . . ." *C. O. 324 No. 36.*

[48] *C. O. 5 No. 752;* British Museum Add. MSS. 35908; *C. O. 324 No. 35.*

[49] The discontent was not confined to Massachusetts but spread to other colonies as far south as the Carolinas. See the complaints of the governors in E. B. Greene, *The Provincial Governor* (1898), pp. 178-9; *New Jersey Archives,* 1st Series, V, p. 321.

[50] The memorial of Governor Shute is reprinted in Perry, III, pp. 121 *ff.* British Museum Add. MSS. 15486 contains the papers relating to the controversy between Governor Shute and the Massachusetts House of Representatives. The most important paper (folios 20-40) is the report of the law officers of the Crown in which they justify the complaints of Governor Shute.

mined to overcome the undue influence of the Bostonians by removing the legislature to Salem.[51]

It was Benjamin Franklin who first clearly discerned the nature of the evil which threatened local self-government in America. "Faction," he remarked in 1736, "if not timely suppressed, may overturn the balance, the palladium of liberty, and crush us under its ruins." He recalled the "common proverb, that the voice of God is the voice of the people." But this, he observed, is true only while the people "remain in their proper sphere, unbiased by faction, undeluded by the tricks of designing men."[52]

The wisdom of Franklin was amply justified by the political events of his own day. For the representatives of the people were shrewdly endeavoring to augment their power. In 1742 the Massachusetts legislature passed bills for dividing three existing towns, thereby creating three new ones. It did not escape the attention of Governor Shirley, as he vetoed the measures, that an increase in the number of deputies in the general court would change the balance of power among the different branches of the provincial government. The superiority of the deputies to the council in point of numbers, in his judgment, already gave the popular assembly an advantage in the government. The governor admitted that it was never the practice of the towns to send to the legislature the full representation to which they were entitled. "But still they have it in their power," he said, "upon an extraordinary emergency to double and almost to treble their numbers, which they would not fail to do, if they should be desirous of disputing any point with His Majesty's Governor, which they might suspect their ordinary members would not carry against his influence in the House."[53]

The charter of 1691 established the general court, consisting of the governor, council and deputies, as the legislature in Massachusetts. It recognized the existence of specific powers in the hands of the governor, many of which could be modified or enlarged by

[51] *Collection of Proceedings,* etc., p. 90.
[52] *Works* (ed. Bigelow), I, p. 428.
[53] *Acts and Resolves of the Province of Massachusetts Bay,* III, p. 69.

instructions from the Crown, and gave him a negative upon the acts of the other branches of the legislature. But the charter nowhere recited the powers conferred upon the House of Representatives. They were prohibited from enacting laws repugnant to the laws of England, and were directed, with the advice and consent of the council, to impose rates and taxes for the necessary defense and support of the provincial government.[54] Unless checked by the governor or council, or by the disallowance of an act by the Privy Council, the deputies had no means of ascertaining the scope and limits of their authority.

It is not surprising that the colonists came to regard the legislative as an undefined power. Especially within the field of taxation, the view prevailed that the deputies of the people were the final judges of their own authority. "May not the House of Representatives," asked the Massachusetts deputies, "who act for, and may be said to be the people, and pay the money, have the disposition of some part of it?"[55] Of course, it may be argued that the deputies were ignoring the constitutional position of the different branches of the legislature.[56] But this was an error which under the circumstances might be expected. They had no clauses in their charter whereby to define their powers, and they could not, in the salary question, leave final judgment in the hands of the governor. To do that would be to make him judge in his own cause. The want of an organ of control in the government responsible to the people thus resulted in a deadlock.

The conflict which developed between the British Parliament and the American colonies after 1763 involved a dispute as to the scope and limits of legislative power. The precise nature of the contest was outlined in 1765 by Francis Bernard, the governor of

[54] The charter of 1691 is reprinted in W. Macdonald, *Select Charters* (1899), pp. 205-12.

[55] *Collection of Proceedings,* etc., p. 104. Governor Sharpe of Maryland in 1758 wrote: "Our lower House has indeed, of late years, claimed a right of calling before them any person they thought proper. They have assumed all the powers of a British House of Commons." N. D. Mereness, *Maryland as a Proprietary Colony* (1901), p. 227.

[56] J. T. Adams, *Revolutionary New England* (1923), p. 135.

Massachusetts. "In Britain," he wrote, "the American governments are considered as corporations empowered to make by-laws, existing only during the pleasure of Parliament, who hath never yet done anything to confirm their establishment, and hath at any time a power to dissolve them. In America they claim to be perfect states, no otherwise dependent upon Great Britain than by having the same king; which having complete legislatures within themselves, are no ways subject to that of Great Britain; which in such instances as it has heretofore exercised a legislative power over them has usurped it. In a difference so very wide, who shall determine? The Parliament of Great Britain? No, say the Americans . . . ; that would be to make them judges in their own cause. Who then? The king? He is bound by charters and constitutions equal to charters, and cannot decree against his own grants. So at this rate there is no superior tribunal to determine upon the rights and privileges of the American colonies."[57] While Governor Bernard wrote as an avowed opponent of the colonial contention, his summary of the dispute is fundamentally correct. The differences between the colonists and the majority in the British Parliament were constitutional in nature, and the arguments continued to seek a formula which would mediate between absolute independence and absolute dependence. When all hope of reconciling these differences had to be abandoned, the colonists resorted to the exercise of the right of revolution.

The theory of the British constitution revealed in the thought of the colonial statesmen embraced the ideal of a balanced government, which was believed to be the virtue of the British system. Attachment to the prerogative was voiced as an essential counterpoise to representative institutions. In the earlier contests with the royal governors, the popular assembly in Massachusetts had sought to maintain an equilibrium between popular rights and the power of the Crown. As the conflict between the colonies and Parliament became embittered on account of the Stamp Act, the ideal of

[57] *Barrington-Bernard Correspondence* (ed. Channing), p. 98. See also W. Knox, *The Controversy between Great Britain and Her Colonies Reviewed* (1769).

a balance between conflicting interests was revived. "Every large community," remarked Andrew Eliot in his *Election Sermon* of 1765, "is constituted of a number of little societies, in which there will be different branches of business. These, whatever pains are taken to prevent it, will have their different connections, and form separate interests; it is vastly difficult for those who govern to keep the balance so exactly poised that neither part may be injured; but much more, to prevent jealousies and suspicions that things are carried by favor and affection."

But it was precisely because the colonists believed that the conduct of the British government destroyed the balance of the constitution that their deepest political instincts were outraged. "The supreme legislative and executive power lodged in the same hands uncontrolled," said the Reverend Edward Bernard, "tends to tyranny. . . . The balance of power is no empty theory. The destruction of it is terrible. . . . It lies with rulers to preserve this balance by a scrupulous adherence to the duties of their departments, and the seasonable check to the violation of prescribed limits."[58] This balance of power appeared to have been lost through ministerial combinations with members of the House of Commons.

When the conflict between the colonists and the British Parliament began in the eighteenth century, more than a hundred years of political experience was behind the men of Massachusetts and Virginia. The crises which had arisen in nearly all of the colonial governments had been over matters of finance and taxation. It was not surprising, therefore, that in its initial stages the struggle between Parliament and the colonial statesmen was over the question of taxation. "No taxation without representation" was the slogan with which the colonists began their resistance. Like all political slogans, this did not reveal the whole truth. The ostensible reasons which men put forward in justification of a course of action are seldom the real reasons. The colonists had, it is true, a genuine grievance in the existing system of parliamentary repre-

[58] *Election Sermon* (1766). The sermon anticipates almost completely the ideas of James Madison.

sentation, but their situation was little worse than that of many Englishmen at home. They could cheerfully agree with Camden and with Chatham that in the matter of internal taxation they were free from parliamentary control. The argument served them little in the achievement of their real purpose. When Charles Townshend sought to fasten upon the colonies a scheme of external taxation, to which by their argument he thought they agreed, resentment blazed forth no less vigorously than during the imposition of the Stamp Act. By uniting taxation with representation, the colonists had embarked upon a line of reasoning which led beyond the immediate question to the ultimate seat of power.

Attack upon the existing system of representation was not difficult to launch. In England there were many who distrusted the innovations begun by William III, which had resulted in the manipulation of the "rotten borough" representation so that it gave a standing majority in support of the ministers. Feverish energies were expended in the search for a logical explanation of a system apparently so unjust. For a time the theory was advanced that the representation was one of the land. "Property is the foundation of power," said DeFoe. "The freeholders are the proper owners of the country. It is their own, and the other inhabitants are but sojourners, like lodgers in a house, and ought to be subject to such laws as the freeholders impose upon them, or else they must remove."[59] The idea appealed very strongly to the Tories as a method of increasing the influence of the country gentlemen, the main support of the party.[60] But the fallacy of a representation of the land lay not only in the fact that ownership does not consist in technical title to property but also in the failure to regard other forms of property in fixing the basis of apportionment. The remark attributed to Bolingbroke, that the landed men were the true owners of the political vessel, and the moneyed men but passengers in it, proved unsound.[61] For many men were quick

[59] *Original Power of the People of England,* p. 16. See also J. Swift, *Of Public Absurdities in England.* Reprinted in *Works* (Bohn Library), IX, pp. 179-82.
[60] P. A. Gibbon, *Ideas of Political Representation in Parliament* (1914), p. 19.
[61] *ibid.,* p. 20.

to see that "the right which property confers on one man, it must confer on all who have it." That is to say, the nature of property continues the same, whatever may be the species of it. Moreover, "if property entitles one man to representation, the title must extend to all who are possessed of it," regardless of their location within the British dominions.[62] The freeholders in the colonies would therefore be entitled to the same degree and kind of representation in Parliament as the freeholders in England. The logical outcome would be an immediate and radical reform of parliamentary representation in the interest not only of the colonies but also of the unrepresented areas and classes in England.

The time was not yet ripe for parliamentary reform. It was still possible for English statesmen to maintain the inequalities in the system of representation which supported their interest. The idea was therefore formulated that in Parliament all British subjects find a virtual representation. "We virtually and implicitly allow the institutions of any government of which we enjoy the benefit and solicit the protection," declared Samuel Johnson.[63] Since all are born the subjects of some state, it is presumed that they consent to the form of its government as long as they remain within its jurisdiction. The great lexicographer recognized that some men, because of their enjoyment of the franchise, had a more direct interest in government than others; but society was properly organized into estates and classes in subordination to which each individual fulfilled his allotted station. He stoutly denied that in the case of the American colonies the disfranchised were unrepresented. "It must always be remembered," he said, "that they are represented by the same virtual representation as the greater part of England; and that if by change of place they have less share in

[62] *Reflexions on Representation in Parliament* (1766). See also *The Inadequacy of Parliamentary Representation* (1783) and *A Petition for a Reform in Parliament* (1793). Complaint about the system of "rotten boroughs" and the usurpation of authority by the Crown are voiced in *An Essay on Parliament* (1793) and G. Dyer, *Complaints of the Poor People of England* (1793). Particulars relating to the parliamentary districts will be found in T. Cunningham, *An Historical Account of the Rights of Election,* etc. (1783).

[63] *Taxation No Tyranny* (1775), pp. 33-4. An earlier pamphlet defending the principle of virtual representation is S. Jenyns, *Objections to Taxation* (1765).

the legislature than is proportioned to their opulence, they by their removal gained that opulence, and had originally and have now their choice of a vote at home, or riches abroad."[64]

The arrogance of Dr. Johnson stirred his countrymen as the papers of duller men could not have done. The "imaginary representation" which secured the towns of Manchester, Leeds and Birmingham voice in Parliament disclosed its inherent absurdity when extended to the colonies. Whig pamphleteers told Dr. Johnson very curtly that the idea of a virtual representation was unknown to the British constitution.[65] Still others, while acknowledging the possibility of considering a virtual representation of the people of Great Britain, vehemently rejected its application to the colonies.[66] "The unrepresented multitudes in Britain," wrote one critic, "have some influence, either with the voters, or the men elected; there is a common bond of union [in whatever immediately attacks their purses] which unites their general interest." But with the colonies the situation is otherwise; there is no such bond between the members of Parliament and the colonists. "Three millions of people would be fit for Bedlam," the pamphlet concludes, "if they consented to repose their fortunes, confidently, in the hands of men at three thousand miles distance—with whose characters they are acquainted *only by their votes in Parliament.*"[67]

If the theory of virtual representation was attacked in England, it was in the colonies wholly rejected. In the first place, it was identified in the minds of the colonists with political corruption. The admixture of popular representation with royal authority was believed to account for the low state of public morals so eloquently depicted in the literature of the time.[68] Burke's famous *Thoughts*

[64] *Taxation No Tyranny,* pp. 50-1. See also J. Wesley, *A Calm Address to Our American Colonies* (1775).

[65] *Tyranny Unmasked* (1775); *An Answer to "Taxation No Tyranny"* (1775).

[66] This was the position taken by the English critics of the Stamp Act. See especially J. Fothergill, *Considerations Relative to the North American Colonies* (1765) and *The Late Occurrences in North America Considered* (1766).

[67] *The Pamphlet Entitled "Taxation No Tyranny" Candidly Considered* (1775), pp. 56-7. See also *A Letter to Mr. John Wesley* (1775).

[68] Ford, pp. 335 *ff.* There is abundant evidence that both in England and America men were thinking of the question of representation as part of the

on the Cause of the Present Discontents, written in 1770, made a diagnosis of the malady from which politics were then suffering. When reflected across the Atlantic the political evils appeared to the colonists to spring from the decay of popular representation and the removal of the government from responsibility to the electorate.

In the second place, the theory appeared irreconcilable with the dogma that government derives its just powers from the consent of the governed. Wearied by the comparison of the American situation with that of Manchester, Birmingham and Sheffield, James Otis declared that if these cities were not represented, they ought to be.[69] Colonial debaters could not believe that a man was represented who stood under a personal incapacity to become an elector. "If every inhabitant of America had the requisite freehold," said Daniel Dulany, "not one could vote, but upon the supposition of his ceasing to become an inhabitant of America, and becoming a resident in Great Britain."[70] The colonial argument therefore insisted that representation was achieved only through an assembly of men actually elected by the persons they were intended to represent. "Let the custom of representation be introduced when it will," declared Richard Bland of Virginia, "it is certain that every freeman, or, which was the same thing in the eye of the constitution, every freeholder had a right to vote at the election of members of Parliament, and therefore might be said, with great propriety, to be present in that assembly, either in his own person or by representation."[71]

larger problem of imperial federation. See especially R. G. Adams, *Political Ideas of the American Revolution* (1922) and McIlwain, *The American Revolution.*

[69] W. Tudor, *Life of James Otis* (1823), p. 191. See also C. H. VanTyne, *The Causes of the War of Independence* (1922), pp. 210 *ff.*

[70] *Considerations on the Propriety of Imposing Taxes on the British Colonies for the Purpose of Raising Revenue by an Act of Parliament* (1765); S. Hopkins, *The Grievances of the American Colonies* (1766).

[71] *Enquiry into the Rights of the British Colonies* (1769); J. Witherspoon, *Considerations on the Nature of Parliament* (1774); T. Fitch, *Reasons Why the Colonies Should Not Be Taxed* (1764). Reprinted in Colonial Records of Connecticut, XII, pp. 651-71. See also the discussion in VanTyne, Chap. VIII.

That is not to say the colonists desired a representation in Parliament. "There is nothing that the colonies would more dread," said Samuel Adams.[72] By that arrangement it was feared the supreme power of Parliament over the colonies would have been established, annihilating their provincial assemblies, and destroying the power of their charters.[73] James Otis could serenely contemplate the destruction of every colonial charter without altering the fundamental rights of the colonists. "They would be men, citizens, and British subjects after all," he said.[74] But he admitted that the idea of colonial representation in Parliament was much disliked by his fellow countrymen. What the colonists desired was the confirmation and continuance of the authority of their local assemblies to legislate, especially in matters of taxation. "The several subordinate powers of legislation in America," wrote Samuel Adams, "seem very probably to have been constituted upon their being considered as free subjects in England, and the impossibility of their being represented in the Parliament, for which reason these powers ought to be held sacred."[75]

The attachment of the colonists to their popular assemblies was reflected in the political arrangements of the revolutionary State constitutions. In these instruments the legislatures became the chief agencies of government; they were looked upon as substitutes for meetings of the people themselves. "In a large society, inhabiting an extensive country," declared John Adams, "it is impossible that the whole should assemble to make laws. The first step, then, is to depute power from the many to a few of the most wise and good."[76] Through representation the legislature was to become a miniature of the electorate.

The relations between the representatives and their constituents were to be regulated through the principle of frequent elections.

[72] *Writings* (1904), I, p. 178.
[73] VanTyne, p. 215.
[74] *Rights of the British Colonies Asserted,* p. 51.
[75] *Writings,* I, p. 69.
[76] J. Adams, *Thoughts on Government* (1776). Reprinted in *Works,* IV, pp. 189 *ff.* See also *Essex Result* (1778). Reprinted in T. Parsons, *Memoir of Theophilus Parsons* (1859), pp. 359 *ff.*

"Where annual elections end, there slavery begins," was a political maxim current in 1776.[77] The people of New Jersey, in adopting their first constitution, cheerfully acquiesced in the lodgment of all power, including that of amending the instrument, in the legislature, provided they retained the right of annual elections.[78] Although the practice of instructions continued, the representative now found his mandate in the clauses of the constitution defining his power. Instructions from constituents might have political but not legal significance. In effect, instructions became assimilated to petitions for redress of grievances.[79]

According to the eighteenth century formula, a republican form of government results from engrafting representation upon democracy. At the same time, much constructive genius is required if a balanced government republican in form is to be created. Among the colonial statesmen who turned to this problem of political construction, it was John Adams who produced the most important and far-reaching results. Believing that "a people cannot be long free, nor ever happy, whose government is in one assembly," Adams developed his conception of a balanced government.[80] According to Adams, the lower house of the legislature should be elected by the people, but this house should choose a second chamber, or council, of twenty or thirty men to have a negative upon all legislation. The executive was to be chosen by joint ballot of the two houses, but contrary to the dominant opinion of the time, Adams would invest the executive with wide powers. In order to safeguard the rights of the people, he insisted upon annual elections. Whatever might be the scheme of the suffrage, the representation ought to be so equal that the legislature will be a miniature of the electorate. "Agree upon the number and qualifications of persons who shall have the benefit of choosing," he said, "or annex this privilege to the inhabitants of a certain extent of

[77] C. M. Walsh, *The Political Science of John Adams* (1915), p. 8; W. C. Webster, "State Constitutions of the American Revolution," *Annals of the American Academy of Political and Social Science,* IX, pp. 380 *ff.*

[78] C. R. Erdman, Jr., *The New Jersey Constitution of 1776* (1929), pp. 60, 69.

[79] Colegrove, pp. 421-2.

[80] *Works,* pp. 190-201.

ground." In short, the ideal envisaged by Adams was a popular government with a bicameral legislature in which the powers are held in a nice poise and balance through their distribution between the two houses.

The political genius of Adams attracted the attention of the Virginia statesmen. His pamphlet entitled *Thoughts on Government* was sketched in January 1776, at the request of George Wythe, who asked him what plan he would advise a colony to pursue in order to get out of the old government and into a new one. Supported by Richard Henry Lee and Patrick Henry, the ideas of Adams found a cordial reception in the convention held in Virginia in the summer of 1776. Meanwhile, the North Carolina delegates at Philadelphia had been authorized to ask Adams's advice upon state government, and he restated his ideas in a letter to John Penn.[81]

The efforts of Lee, Henry and Jefferson to establish a democratic but balanced government in Virginia were combated by those who believed the scheme of Adams to be too revolutionary. Carter Braxton, in an address to the convention, argued that a people cannot be drawn from their former institutions and subjected to wholly new forms. In Virginia the British forms, the essence of which was the balance of power, had long existed. The British system, according to Braxton, should therefore be adapted to the exigencies of the colony.

With much acuteness Braxton penetrated the weakness of the existing government in Great Britain. "If the independence of the Commons could be secured," he said, "and the dignity of the Lords preserved, how can a government be better formed for the preservation of freedom? If placemen and pensioners were excluded a seat in either house, and elections made triennial, what danger could be apprehended from prerogative? I have the best authority for asserting that with these improvements, added to the suppression of boroughs and giving the people an equal and adequate represen-

[81] A. Nevins, *The American States During and After the Revolution* (1924), p. 125.

tation, England would have remained a land of liberty to the latest ages.

"However necessary it may be to shake off the authority of arbitrary British dictators, we ought nevertheless to adopt and perfect that system, which England has suffered to be so grossly abused, and the experience of ages has taught us to venerate."[82]

If Braxton had contented himself with his incisive criticism of the defects of the British system, his remarks would undoubtedly have found applause. But he outlined a type of government which, had it been adopted, would have established in Virginia the same evils he condemned abroad. The plan proposed by Braxton included an assembly elected by the people every three years. This assembly was to choose an upper house, or council of state, to hold office for life and a governor whose term was during good behavior. The appointment of all judges, military officers, and inferior civil officers was to be made by the governor.

Men were quick to see that in a government of this sort power would soon be lodged in an aristocracy entrenched in the upper house and the executive against which the popular assembly could not serve as a counterpoise. Patrick Henry dismissed Braxton's scheme as "a silly thing."[83] Richard Henry Lee thought it betrayed "the little knot or junto whence it proceeded." With profound distrust of slavishly copying the colonial model, Lee said: "The difficulty we have to encounter in constructing this fabric from whence so great good or evil may result, consists certainly in a blending the three simple forms of government in such a manner as to prevent the inordinate views of either from unduly affecting the others, which has been the case in England. . . . But there a fine design was spoiled in the execution. The prerogative of making peers and boroughs effectually destroyed the equipoise and prevented an opportunity of applying that corruption which has now swallowed up everything but the forms of freedom in Great Britain. However imperfect the English plan was, yet our late government in Virginia was infinitely worse. With us two-thirds

[82] *An Address to the Convention of Virginia* (1776).
[83] W. H. Henry, *Patrick Henry* (1891), I, p. 413.

of the legislature, and all the executive and judiciary powers, were in the same hands. In truth it was very near a tyranny, although the mildness with which it was executed under Whig direction made the evil little felt."[84]

In the final draft of the Virginia constitution, the ideas of Adams rather than those of Braxton prevailed. To the articles outlining the structure of government George Mason prefixed the famous Declaration of Rights which has remained a charter of liberties for the people of Virginia to the present time. This document was in the main a restatement of the fundamental principles of English constitutional development as they had emerged in Magna Carta, the Petition of Rights, and similar pronouncements. It emphasized the separation and balance of powers as essential to free government. If the practical arrangements adopted were not wholly consistent with the theory advanced by Mason, it was because "Mason's plan was a little too well balanced to suit a period which distrusted all governmental agencies except the legislature."[85]

In contrast with the ideas of John Adams were those of an anonymous writer whose pamphlet, *The People the Best Governors,* appeared in 1776. This pamphlet is now little known, although in Revolutionary days its influence was great.[86] From its pages were gleaned the philosophical arguments in behalf of a unicameral legislature and the basic notion that a balanced government depends upon the establishment of an equilibrium of interests among the citizens. "The more simple, and the more immediately dependent, the authority is upon the people the better," the pamphlet recites, "because it must be granted that they themselves are the best guardians of their own liberties."

The idea that the representative assembly can select a council, or second chamber, which shall have a negative upon legislation is denied. "If there be a distinct negative over those that enact the

[84] *Letters of Richard Henry Lee* (ed. Ballagh), I, pp. 190-1. See also K. M. Rowland, *Life and Correspondence of George Mason* (1892), I. p. 226.
[85] Nevins, p. 147.
[86] The pamphlet is reprinted in F. Chase, *History of Dartmouth College* (1891), Appendix D.

laws," the pamphlet continues, "it can by no means derive it from them as representatives of the people, and for these reasons: As far as there is any power over the rights of the people, so far they themselves are divested of it. Now, by choosing representatives to make laws for them, they put that power out of their own hands; yet they do not deposit it into the hands of their representatives to give to others, but to exercise it in their room and stead. Therefore, I say, for the representatives to appoint a council with a negative authority, is to give away that power, which they have no right to do, because they themselves derived it from the people. The representatives have no right to enlarge their power which they have received, nor to alter or put away any incumbrance upon it, by making a negative body."

It is, of course, admitted that the people themselves can establish a "negativing" body. "But upon this plan those that are called representatives have only a partial right as such; for they have a delegated power from the people to act no farther than this negative body concurs. Now this said negative body are likewise virtually the representatives of the people, and derive just so much authority from them as will make up the defect of the others, viz., that of confirming." Instead of a senate with negative power, there should be a council of advice, or council of censors, to offer suggestions to the representative body.

The development of the argument for a unicameral legislature leads to the consideration of the basis of representation. The proposal that representation depend upon the amount of taxation is dismissed. "For taxation only respects property, without regard to the liberties of a person; and if representation should be wholly limited by that, the man who owns six times as much as another would consequently have six times the power, though their natural right to freedom is the same." Nor is it less exceptionable to apportion representation entirely according to the number of inhabitants. If this be done, as often as the number of inhabitants increases or diminishes, the representation must also change. "As often as the inhabitants in a state vary their situation, the weight of legislation

changes; and accordingly the balance of power is subject to continual and frequently unforeseen alterations."

How shall the system of representation be determined? The answer is to be sought by annexing representation to distinct units of territory. Every government is necessarily confined to some extent of territory. Some parts may at first be more peopled than others, but in time they become generally alike settled. An equal diffusion of population results from an interdependence of economic interests. Like Harrington a century earlier, this unknown pamphleteer looks to the future widespread distribution of land as the means whereby an equilibrium in society is to be maintained.

"Representation, as the only security of liberty, must have a stable foundation," the pamphlet concludes. "Land is the most solid estate that can be taxed, and is the only permanent thing. Let that therefore be divided into equal convenient parts in a state, as is the case with our townships, and let the inhabitants possessing the said parts or townships be severally and distinctly represented. By this means the plan of the legislature will be fixed, and an earnest of it handed down to posterity. . . .

"But it may be objected by some that live in a government where towns are very unequally settled that there is no right or justice in the inhabitants having the same advantages as to representation, since those that live in the large towns must not only support their own but also help to support the representatives of the smaller ones. The objection is trifling. Every government is an entire body politic, and therefore each particular member in the legislature does not represent any distinct part, but the whole of the said body. . . . The consequence is, that if every incorporate town, small as well as large, has a right to choose a representative, he does when chosen represent the whole government; and therefore ought to be paid by it."

While the theory of representation evolved in this pamphlet became the familiar system in Connecticut and other New England States, where the town was the unit in the apportionment of representation, the idea of a unicameral legislature appealed to none except the framers of the first constitution in Pennsylvania. Few

constitutions have had less distinguished authors. The leading statesmen of the colony were occupied at the time with the work of the Continental Congress, and the task of drafting a State constitution devolved upon intellectual weaklings. The foremost of these were George Bryan, an enterprising man of Irish birth who possessed an active but shallow mind, and James Cannon, a Scotch professor of mathematics in the college at Philadelphia. Not one-sixth of the members of the convention had ever read a word upon constitutional topics.[87] The one exception to the dull mediocrity was Benjamin Franklin, then nearly seventy, who was chosen its president.[88]

The chief interest in the Pennsylvania constitution lies in the adoption of a unicameral legislature. It has been argued that the concentration of power in a single assembly had been the objective of the people of Pennsylvania almost since the beginning in 1682, and that this had been secured since 1723 in so far as purely internal affairs were concerned. Judge Bryan and his supporters could therefore claim to be conservatives who were seeking to preserve for the people of Pennsylvania the political arrangements under which the colony had prospered.[89]

This argument overlooks the fact that in the colonial government the governor always had a negative and was therefore part of the legislature.[90] In the new constitution a plural executive, consisting of a council of thirteen, one member to be chosen from each county and the city of Philadelphia, had no control over the acts of the legislature. The only organ of control was the council of censors. This curious body was to meet every seven years, and had power to order impeachments, recommend the repeal of laws, pass public censures, and call a convention to amend details.[91]

[87] Nevins, p. 150.

[88] The constitution was the work of George Bryan and James Cannon. How much Franklin contributed is doubtful. A. Graydon, *Memoirs of His Own Times* (1846), pp. 285 *ff.*

[89] B. A. Konkle, *George Bryan and the Constitution of Pennsylvania* (1922), Chap. IX.

[90] B. Rush, *Observations upon the Present Government of Pennsylvania* (1777).

[91] L. H. Meader, "The Council of Censors," *Brown University Historical Studies,* X.

The Pennsylvania constitution was therefore an experiment in uncontrolled democracy which disregarded the political circumstances of the colony.

It was in vain that the opponents of Judge Bryan and his followers argued for a wider distribution of governmental power. One pamphleteer advocated the participation of three bodies in legislation. "The vesting the supreme legislature in three different bodies," he wrote, "has a great tendency to give maturity and precision to acts of legislation, as also stability to the state, by preventing measures from being too much influenced by sudden passions. There is no danger of the council obstructing useful laws; for all power being immediately derived from the people, the councillors will not dare to dissent from laws proposed to them by the assembly and the senate, unless those laws are exceptionable, and in such cases they ought to dissent. Another reason for giving them a share in legislation is this, that the executive power being vested in them, the other two branches, if possessed of all the legislative power, might gradually undermine the executive or greatly embarrass its operations. To render the councillors reasonably independent of the other branches, their salaries should be fixed and they ought not to be exposed to an annual vote of those who may wish to get into their offices. The people are their sovereigns, and by their judgment they ought to stand or fall, when the offices expire." The plan proposed a balanced government in which the sovereignty is declared to be vested in an assembly, a senate and a council. The governor is merely the presiding officer of the council, and the concurrence of a majority in each of the three bodies is necessary to legislation.[92]

But no system of balanced government could gain a hearing in the Pennsylvania convention. The dominant majority created a government in which all power was exercised from a single center without any safeguards against turbulence and oppression. The council of censors proved inadequate to patch up the defective

[92] *An Essay of a Frame of Government for Pennsylvania* (1776).

instrument, and a period of turmoil and uncertainty ensued until the new constitution was adopted in 1790.[93]

Elsewhere the theory of the separation and balance of powers was generally proclaimed, although the practical arrangements were often defective. The sonorous phrases which John Adams wrote into the bill of rights of the Massachusetts constitution of 1780 were in the nature of a declaration of purpose. "In the government of this commonwealth," the statement reads, "the legislative department shall never exercise the executive and judicial powers or either of them; the executive shall never exercise the legislative and judicial powers or either of them; the judicial shall never exercise the legislative and executive powers or either of them—to the end that it may be a government of laws and not of men." Despite the clarity with which the theory was set forth, the constitutional construction was criticized on the ground that a balance of power had not been established.[94]

The revolutionary State constitutions proved uniformly defective in that the balance of power was destroyed through a preponderance in favor of the legislature. Legislative supremacy tended everywhere to prevail, and the legislature engrossed the powers of the other departments. The theory of the separation and balance of powers was nowhere supported by adequate constitutional constructions. "If we look into the constitutions of the several States," Madison remarked, "we find that, notwithstanding the emphatical and, in some instances, the unqualified terms in which this axiom has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct. . . ."[95] Will it be sufficient to mark, with precision, the boundaries of these departments, in the

[93] An account of the government under the constitution will be found in *Proceedings Relative to Calling the Conventions of 1776 and 1790* (1825). The reports of the Council of Censors are at pp. 111 *ff.*

[94] See "Joseph Hawley's Criticism of the Constitution of Massachusetts," *Smith College Studies in History,* III. In this connection the conservative dissatisfaction with the Massachusetts constitution of 1778, which was not adopted, is interesting. See *Essex Result.*

[95] *Federalist,* No. XLVII.

constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power? This is the only security which appears to have been principally relied on by the compilers of most of the American constitutions. But experience assures us, that the efficacy of the provision has been greatly overrated; and that some more adequate defense is indispensably necessary for the more feeble, against the more powerful, members of the government. The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."[96] Faulty construction rather than wrong principles marred the first State constitutions. The authors of these documents "understood perfectly the principles of liberty," but most of them "were ignorant of the forms and combinations of power in republics."[97] It was to remedy the defects of the State constitutions quite as much as to form a more perfect union that the Federal Convention was called in 1787.

The stock of fundamental political ideas which had come into the possession of the American people by the time of the Federal Convention was abundant. It comprised chiefly the borrowings from the liberal thought of seventeenth century England. But almost every idea, when transplanted to this side of the Atlantic, had to undergo changes to meet the political circumstances of the colonies. Since every age has its own peculiar categories of thought, it is not surprising that the Americans talked in terms of the contract philosophy at that time so popular in Europe. But their adaptations of the contract theory were determined by their own requirements. There was little of the doctrinaire about the American statesmen; they utilized theory for definite constructive ends.

The notion of a state the origin of which could be referred to

[96] *Federalist*, No. XLVIII. See also Jefferson, *Notes on Virginia*.

[97] Corwin, "Progress of Constitutional Theory between the Declaration of Independence and the Meeting of the Philadelphia Convention," *American Historical Review*, XXX, p. 513. *The Political Establishments of America Reviewed* (1784) canvasses the weaknesses of the American political system and advocates the abolition of State governments and the establishment of a united government for the whole country.

contract and in which sovereignty vested in the people was fundamental to all American speculation of the time. While many men were content to introduce the idea of legislative supremacy, when qualified by annual elections, they were careful to assert the ultimate power of the people. It was precisely at this point that American constitution-makers had to find a new political device. Legislative power could not be established uncontrolled over a people who declared themselves to retain possession of certain fundamental rights. Judicial control therefore became an essential feature of the American constitutional system in order to place limitations upon the law-making body. When the courts began to exercise the power to pass upon the constitutionality of legislation, it was possible to maintain in practice the demarcations of power set forth in the written constitutions. The ideal of a balanced government was then capable of being realized.

CHAPTER III

THE FOUNDATIONS OF DEMOCRACY

WHEN the convention to frame a constitution for the United States assembled at Philadelphia in May 1787, the question of the ultimate seat of authority did not require discussion. Every delegate realized that each separate constitutional construction would have to find ratification at the hands of the people. But there remained the issue between free will and determinism. That is to say, were the institutions to be set up in the Constitution to rest upon the choice of the convention or had they already been determined by the nature and life of the American people? In the solution of this question the members of the convention displayed great breadth of knowledge and much acuteness in evaluating human motives.

Among the leading men of the convention none stood out more conspicuously than James Madison. He was essentially a scholar in politics, blending together vast knowledge and profound insight into human nature. A graduate of Princeton in the Class of 1771, Madison returned for further study. His undergraduate training in the classics was followed by the reading of Hobbes, Locke, Sidney, Pufendorf and other writers on political science in the library of President Witherspoon.[1] The writings of Montesquieu, which formed the basis of Witherspoon's classroom lectures, Madison studied minutely. He possessed the complete equipment which marked the man of education in the American colonies, and his ability to quote from Livy or Plutarch's *Lives* and to

[1] The Library of Princeton University possesses the classroom lectures of President Witherspoon as well as the books contained in his private library. For an account of Witherspoon's ideas on education, see W. S. Carpenter, "Political Education in the Time of John Witherspoon," *Princeton Alumni Weekly*, XXVIII, pp. 489 *ff*. See also V. L. Collins, *President Witherspoon* (1925), II, pp. 201-16.

explain the political contrivances of the ancient world assured him respectful attention in any assembly.

To the inventive genius of Madison, government was a problem to be worked out by the superior minds in the convention without considering the opinions of the "unreflecting multitude."[2] The method of his political reasoning was very largely from historical analogy. He assumed, as Montesquieu had done, the accuracy and sufficiency of the accounts left by the Roman historians, and never hesitated upon the questions of the nature of republics and the principles underlying confederacies to cite examples from the ancient world. In one of the first sessions, "Mr. Madison in a very able and ingenious speech ran through the whole scheme of the government,—pointed out all the beauties and defects of ancient republics; compared their situation with ours wherever it appeared to bear any analogy, and proved that the only way to make a government answer all the end of its institution was to collect the wisdom of its several parts in aid of each other whenever it was necessary."[3] When William Paterson introduced what became known as the "small State plan" for the modification of the Articles of Confederation, Madison led the opposition and "reviewed the Amphyctionic and Achaean confederacies among the ancients, and the Helvetic, Germanic and Belgic among the moderns, tracing their analogy to the United States—in the constitution and extent of their federal authorities—in the tendency of the particular members to usurp on these authorities and to bring confusion and ruin on the whole."[4]

Notwithstanding the flavor of finality which attaches to Madison's scholarly demonstrations, his methods of reasoning failed to convince some of his colleagues. In an age which could not boast of critical classical scholarship, his facts were manifestly insufficient. Moreover, it was felt that the differences in his comparisons were more striking than the agreements. Charles Pinckney retorted that "the people of this country are not only very

[2] Farrand, I, p. 215.
[3] *ibid.*, p. 110.
[4] *ibid.*, p. 317.

different from the inhabitants of any state which we are acquainted with in the modern world . . . but their situation is distinct from either the people of Greece or Rome, or of any state we are acquainted with among the ancients. Can the orders introduced by the institution of Solon, can they be found in the United States? Can the military habits and manners of Sparta be resembled to our habits and manners? Can the Helvetic or Belgian confederacies, or can the unwieldy, unmeaning body called the Germanic Empire, can they be said to possess either the same or a situation like ours?" He denied that any two people were so exactly alike as to admit of the same political institutions. "A system," he said, "must be suited to the habits and genius of the people it is to govern, and must grow out of them."[5]

Many years later John Stuart Mill in the opening sentences of his famous essay on representative government summed up the two conflicting theories respecting political institutions revealed in the debate between Madison and Pinckney. But the Federal Convention anticipated Mill in holding that each of these doctrines is untenable if pushed to an exclusive and logical conclusion. The framers of the Constitution discovered that although the construction of a government may be the result of the conscious purposes of men, the institutions set up must be congenial to the spirit of the people for whom they are intended.

Everyone is familiar with the statement of Gladstone that "the American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man." Yet the extent to which political institutions are a matter of rational choice received less enlightenment from the Convention of 1787 than has generally been supposed. The primary purpose was to establish a national government which should provide security for private rights and the steady dispensation of justice. "Interferences with these," said Madison, "were evils which had more perhaps than anything else produced this convention." But the framers of the Constitution could not break with the political theory of the time.

[5] Farrand, I, pp. 401-2. For a similar criticism by James Wilson, see J. Elliott, *Debates* (1863), II, pp. 422-3.

They were fully conscious of the fact that the genius of the American people was in favor of democracy.[6] Indeed, the limits of political speculation were fixed by the democratic dogma of the Declaration of Independence. There could be no dissent from the mandate that governments derive their just powers from the consent of the governed. Confronted with the necessity of reconciling the principles of democracy and the security of private rights, the convention was reduced to the dilemma noted by Alexander Hamilton in which "the members most tenacious of republicanism . . . were as loud as any in declaiming against the vices of democracy."

Hamilton, as he argued for the adoption of the Constitution, raised the question "whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and chance." His answer was that a government would succeed in proportion to the interest enlisted in its support.[7] "Men will pursue their interests," he told the New York Convention in 1788. "It is as easy to change human nature as to oppose the strong current of selfish passions. A wise legislator will gently divert the channel, and direct it, if possible, to the public good."[8] According to this principle, the part to be played by reason is to point out interest.

What Hamilton assumed was that men recognize their interests and consciously shape their political conduct to promote them. A man may have a very clear conception of his own interest. But it is a difficult thought process to discover the precise measures which will promote that interest. A merchant conceives it to be his interest to sell goods. But he can recognize only dimly, and often not at all, the kind of legislation which will assure him the best market. Hamilton appreciated the bewilderment of the average citizen when called upon to make a decision which he hopes may be consistent with his interest. He believed that this decision

[6] *ibid.*, p. 101.
[7] *Federalist*, No. XI.
[8] Elliott, II, p. 320.

could be rightly made only by the legislator. It was therefore necessary that government possess sufficient stability and permanency to control the political vagaries of the people.

In the Federal Convention, Hamilton "acknowledged himself not to think favorably of republican government," but "he was sensible at the same time that it would be unwise to propose one of any other form. In his private opinion, he had no scruple in declaring . . . that the British government was the best in the world, and that he doubted much whether any thing short of it would do in America."[9] These remarks led to the charge that Hamilton favored a monarchical form of government. In point of fact, he desired a very simple political structure and aimed his criticism at the "multiple agency system" involved in the contemporary conception of a republic.

Hamilton appreciated that the British monarchical form could not be transferred intact to American soil. He believed at this time a maxim he later expressed by saying that "what may be good at Philadelphia, may be bad at Paris, and ridiculous at Petersburg," a formula which, of course, could be reversed and made to include London.[10] His real desire seems to have been to combine popular participation in government with the separation of powers and the stability of the British system. Writing to Gouverneur Morris ten years before the Federal Convention, Hamilton had said: "That instability is inherent in the nature of popular government I think very disputable; unstable democracy is an epithet frequently in the mouths of politicians; but I believe that from a strict examination of the matter, from the records of history, it will be found that the fluctuations of governments in which the popular principle has borne a considerable sway, have proceeded from its being compounded with other principles;—and from its being made to operate in an improper channel. Compound governments, though they may be harmonious in the beginning, will introduce distinct interests, and these interests will clash, throw the state into convulsions, and produce change or dissolution. When the deliberative or judicial

[9] Farrand, I, p. 288.

[10] L. B. Dunbar, *Monarchical Tendencies in the United States* (1923), p. 88.

powers are vested wholly or partly in the collective body of the people, you must expect error, confusion, and instability. But a representative democracy, where the right of election is well secured and regulated, and the exercise of the legislative, executive, and judiciary authorities is vested in select persons, will, in my opinion, be most likely to be happy, regular, and durable."[11] The idea of responsible government through the cooperation of the legislative and executive departments is here discerned long before the rise of the cabinet system was reflected in political philosophy.

The ideas of Hamilton did not prove acceptable to the Federal Convention partly because of the aristocratic flavor of some of his proposals but especially on account of the extreme nationalism of his plan. His proposal to reduce the States to "corporations for local purposes" alienated the entire group of believers in States' rights.[12] Hamilton never appreciated the popular attachment to the State governments. His realism would not permit him to see that men often cling through sentiment to institutions which may be shown through logical arguments to be imperfect. Toward the close of his life, Hamilton remarked that "nothing is more fallacious than to expect to produce any valuable or permanent results in political projects by relying merely on the reason of men. Men are rather reasoning than reasonable animals, for the most part governed by the impulse of passion."[13] If he had adapted his proposals in the Convention of 1787 to the spirit of the American people, his arguments would doubtless have carried much weight. But, as Dr. Johnson said, "the gentleman from New York . . . has been praised by everybody, he has been supported by none."

The most sublimated conception of democracy is to be found in the utterances of James Wilson of Pennsylvania. Born and educated in Scotland, Wilson came to America when twenty-three years old. He served several times in Congress and was one of the

[11] *Works,* IX, pp. 71-2.
[12] Farrand, I, p. 287. Hamilton explained in the Federal Convention the precise position he thought the States ought to occupy in the new scheme of government, but his remarks were not calculated to soothe the advocates of States' rights. See Farrand, I, pp. 323, 358.
[13] *Works,* X, p. 432.

signers of the Declaration of Independence. At forty-five he was regarded as one of the ablest lawyers in the country. Intellectually the equal of Madison, he was not afflicted with the shyness which marked the Virginian in the company of others. But he was at a disadvantage in lacking the intimate acquaintance with his colleagues which Madison possessed.

From the outset Wilson was at once democratic and national. "He could not agree that property was the sole or the primary object of government and society. The cultivation of the mind was the most noble object. . . . Conceiving that all men wherever placed have equal rights and are equally entitled to confidence," he insisted that "the majority of people wherever found ought in all questions to govern the minority."[14] None, with the exception of Gouverneur Morris, was so often on his feet during the debates. Each time he spoke directly to the purpose, seeking to emphasize and enlarge upon the idea that any government, if it is to enjoy the public confidence, must reflect the mind or sense of the people at large.

Wilson "wished for vigor in the government, but he wished that vigorous authority to flow from the legitimate source of all authority."[15] For this reason, he sought "to derive not only both branches of the legislature from the people, without the intervention of the State legislatures, but the executive also."[16] He admitted the difficulty of defining with precision the sentiments of the people throughout the thirteen States. But "he could not persuade himself that the State governments and sovereignties were so much the idols of the people, nor a national government so obnoxious to them as some suppose." Both were meant for the people, and "the same train of ideas which belonged to the relation of the citizens to their

[14] Farrand, I, p. 605. For an interesting study of the political theories of James Wilson, see A. C. McLaughlin, "James Wilson in the Philadelphia Convention," *Political Science Quarterly*, XII, pp. 1 *ff*. The most complete statement of Wilson's philosophy is contained in his lectures before the law students of the University of Pennsylvania in 1790. *Works* (ed. Andrews), 2 vols., Chicago, 1896.

[15] *ibid.*, p. 132.

[16] *ibid.*, p. 69.

State governments were applicable to their relations to the general government, and in forming the latter, we ought to proceed by abstracting as much as possible from the idea of State governments. With respect to the province and objects of the general government, they should be considered as having no existence."[17]

Filled with the democracy of the next century, Wilson regarded the officers of government as the servants of the people. Representation was "made necessary only because it is impossible for the people to act collectively." From this theory it necessarily followed that in the selection of political institutions the convention should aim at a single object, "the accommodation of the voters."

The democratic doctrine was favored by the economic circumstances in the United States. Among the people there were few distinctions of rank and less of fortune. Land was the chief form of property and its wide distribution brought about in fact a considerable economic equality to correspond to the theory of political equality. It was argued by Charles Pinckney that "the people of the United States are more equal in their circumstances than the people of any other country—that they have very few rich men among them . . . ; that it is not probable that this number will be greatly increased; that the genius of the people, their mediocrity of situation and the prospects which are afforded their industry in a country which must be a new one for centuries are unfavorable to the rapid distinction of ranks." Pinckney looked to the abundant free lands in the public domain west of the Alleghenies to maintain the economic and social equality of the American people. "That vast extent of unpeopled territory," he said, "which opens to the frugal and industrious a sure road to competency and independence will effectually prevent for a considerable time the increase of the poor or discontented, and be the means of preserving that equality of condition which so eminently distinguishes us."[18]

[17] *ibid.*, p. 253.

[18] *ibid.*, p. 400. The remarks in the convention of Charles Pinckney, Mason and Madison on the one side and Gouverneur Morris, Elbridge Gerry and

But the democratic ideal, as Wilson moulded it, could not be reconciled with the necessary protection of private rights. Madison was quick to see that the central problem of democracy is not the maintenance of equality but the preservation of liberty. Within the limited areas of the several States disturbances had already arisen which made him shrink from the logical consequences of unfettered democracy. Despite the apparent freedom of economic opportunity, Madison saw in the popular demands for paper-money legislation and stay laws evidences of a diversity of interests among the people of the United States. In reply to Pinckney, he said: "We cannot be regarded even at this time as one homogeneous mass in which every thing that affects a part will affect in the same manner the whole. In framing a system which we wish to last for ages, we should not lose sight of the changes which ages will produce. An increase of population will of necessity increase the proportion of those who labor under all the hardships of life and secretly sigh for a more equal distribution of its blessings. These may in time outnumber those who are placed above the feelings of indigence. According to the equal laws of suffrage, the power will slide into the hands of the former. No agrarian attempts have yet been made in this country, but symptoms of a levelling spirit, as we have understood, have sufficiently appeared in certain quarters to give notice of the future danger."[19] Equality which did not exist by nature could not be established through universal suffrage and majority rule. To the Virginian it was fallacious to suppose "that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions."[20] As long as there was a diversity in the faculties

others on the other side of the question of the political significance of the frontier anticipate the conclusions reached by nearly all of the group of American historians who have in recent years dealt so copiously with the subject. By 1787 the frontier as a political issue was fully defined.

[19] Farrand, I, pp. 421-2.

[20] *Federalist,* No. X. Madison had long reflected upon the theory advanced in this number of the *Federalist.* As early as April 1787, he had outlined his ideas. *Writings* (ed. Hunt), II, pp. 361 *ff.* This sketch formed the basis of his speech of June 6 in the Federal Convention. Farrand, I, p. 135.

of men, there could be no uniformity of interests. Inequality Madison regarded as the natural condition of men, which the statesman must take into account in the formation of popular government.

Madison believed that democracy could be reconciled with the security of private rights if the spirit of faction could be curbed. By faction he did not mean a party in the modern sense of the word, but "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."[21] Such "blocs" would always be dangerous because always actuated by selfish motives.

But the causes of faction he traced to "the nature of man," where latent dispositions are "brought into different degrees of activity, according to the different circumstances of civil society." He observed that "all civilized societies would be divided into different sects, factions, and interests, as they happened to consist of rich and poor, debtors and creditors, the landed, the manufacturing, the commercial interests, the inhabitants of this district or that district, the followers of this political leader or that political leader, the disciples of this religious sect or that religious sect. In all cases where a majority are united by a common interest or passion, the rights of the minority are in danger."[22]

Although the causes of faction could not be removed, the control of its effects was within human power. "The only remedy," said Madison, "is to enlarge the sphere, and thereby divide the community into so great a number of interests and parties, that in the first place a majority will not be likely at the same moment to have a common interest separate from that of the whole or of the minority; and in the second place, that in case they should have such an interest, they may not be apt to unite in the pursuit of it."[23] In other words, the vital political forces in the state should

[21] *Federalist,* No. X.
[22] Farrand, I, p. 135.
[23] *ibid.,* p. 136.

be tied up in a nice poise through the clauses of a written constitution. A government so contrived would, as Madison believed, "secure the permanent interests of the country against innovation."

The ideal which Madison envisaged was one of dynamic equilibrium. He thought that by deriving the various branches of the government from different sources all positive action to the detriment of established order and guaranteed rights would be checked from the outset. Every safeguard against "the mutability of public councils" was to be embodied in the interior structure of the government itself. The keystone of the whole edifice was to be the system provided for judicial control, through which the Constitution would be preserved inviolate against legislative or executive aggression.

Apart from the idea of judicial control, which is the unique contribution of America to the science of government,[24] the theory is that set forth by Montesquieu. Madison had studied carefully the pages of the observant Frenchman. The equilibrium of power which the latter had thought necessary to balance the enormous preponderance of royalty in England Madison conceived to be equally essential in the United States as a restraint upon temporary majorities in pursuit of their selfish interests. What he failed to take into account was the difference in the way in which power had come into the hands of the people in the two countries. The evolution of the British constitution had witnessed the admission to civil and political rights of successive classes or estates. The rights which each order came to enjoy were first wrung as privileges from the Crown. At no time was the grant of privileges conditioned upon a theory of abstract human equality. On this side of the Atlantic, however, the establishment of independent governments was accompanied by a declaration that all men are created equal. It is true that property qualifications and religious tests barred the way to an immediate realization of political equality. But the free-and-equal doctrine had been proclaimed as the ideal,

[24] Carpenter, *Judicial Tenure in the United States* (1918), Chap. I. See also Beard, *The Supreme Court and the Constitution* (1912), and C. G. Haines, *The American Doctrine of Judicial Supremacy* (1914).

and no theory which gave to property and to estates a place in the process of government could withstand its triumphal advance. The analogy which Madison sought to trace through the writings of Montesquieu between the conditions of political life in England and those in America proved as defective as his earlier essays in the comparative governments of ancient and modern times. Nevertheless, the idea prevailed that the interior structure of the government should be so contrived "that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."[25]

The maintenance of the nice poise and balance of political forces involved in the theory of Madison would seem to demand that government remain within the control of the classes most directly affected. This thought was undoubtedly in the mind of Gouverneur Morris when he proposed restricting the right of suffrage to the freeholders. Morris appears to have been convinced of the utter depravity of man. "Give votes to the people who have no property," he said, "and they will sell them to the rich who will be able to buy them. He looked to the time when the country will abound with mechanics and manufacturers who will receive their bread from their employers. Will such men be the secure and faithful guardians of liberty?"[26] But he was reminded by George Mason that in some States the franchise had already been extended beyond the freeholders. Only five States restricted the right to vote to owners of real estate. In seven States alternatives to landed property were permitted, while in Pennsylvania the only requirement was the payment of public taxes.[27]

Moreover, there was a strong sentiment in the convention that a property qualification ought to embrace other forms of property besides real estate. Rufus King objected to the exclusion of the "monied interest," and Madison agreed that property in land was

[25] *Federalist,* No. LI.

[26] Farrand, II, p. 202.

[27] K. Porter, *History of Suffrage in the United States* (1918), pp. 12-13. George Mason declared in the convention that eight or nine States had already extended the right of suffrage beyond the freeholders. Farrand, II, p. 201.

not a sure criterion of wealth.[28] The idea was freely expressed that "every man having evidence of attachment to and permanent common interest with the society ought to share in all its rights and privileges."[29] None could pretend that these virtues were confined to the freeholders.

But the real obstacle to the inclusion in the Constitution of a property qualification for the exercise of the suffrage was the accomplished fact that in some States the franchise was enjoyed by persons who were not owners of property. Nathaniel Gorham declared that "the elections in Philadelphia, New York and Boston, where the merchants and mechanics vote, are at least as good as those made by the freeholders only."[30] Madison was of the opinion that the freeholders "would be the safest depositaries of republican liberty. But he was uncertain how a constitutional provision limiting the suffrage to freeholders would be received in States where the right was now exercised by every description of people."[31] Pierce Butler "feared any provision which would effect any disfranchisement,"[32] and James Wilson was "against abridging the rights of election in any shape."[33] The discussion concluded with the solemn warning of Gorham that "the people of America who have been accustomed to vote without freeholds will not give it up."[34]

In the decision to omit from the Constitution any qualification for the suffrage the "rooted prejudices" of the people controlled the judgment of the delegates. But the powerful leaven of the democratic philosophy was destined to penetrate even further into the political system under construction. The adoption of the rule of numbers in fixing the apportionment of representation and the admission of new States on equal terms with the old foreshadowed the democracy of the nineteenth century.

[28] Farrand, II, pp. 123-4.
[29] *ibid.*, p. 203. For a similar statement by Alexander Hamilton, see *Works*, I, p. 90.
[30] *ibid.*, p. 216.
[31] *ibid.*, p. 204.
[32] *ibid.*, p. 202.
[33] *ibid.*, I, p. 375.
[34] *ibid.*, p. 216.

The controversy in the Convention of 1787 over the apportionment of representation is intimately connected with the long series of contests between the democratic forces of the frontier and the aristocratic pretensions of the tidewater settlements. As early as 1676 the social revolt in Virginia known as Bacon's Rebellion indicated the character of the coming struggle. "In general this took these forms: contests between the property-holding class of the coast and the debtor class of the interior, where specie was lacking, and where paper money and a readjustment of the basis of taxation were demanded; contests over defective or unjust local government in the administration of taxes, fees, lands, and the courts; contests over apportionment in the legislature, whereby the coast was able to dominate, even when its white population was in the minority; contests to secure the complete separation of church and state; and, later, contests over slavery, internal improvements, and party politics in general."[35] This antagonism between the coast and the interior was exhibited along the entire frontier. In New England it gave rise to Shays' Rebellion and to separatist movements in Maine, New Hampshire and Vermont. The frontiersmen in Pennsylvania in 1764 demanded a right to share in political privileges with the older part of the colony, and protested against the apportionment by which the counties of Chester, Bucks, and Philadelphia, together with the city of Philadelphia, elected twenty-six delegates, while the five frontier counties had but ten. The three old wealthy counties under Quaker rule feared the growth of the West, therefore made few new counties, and carefully restricted the representation in each to preserve the majority in the old section. The States south of the Potomac showed the same lodgment of power in the hands of the coast, even after population preponderated in the upland country. From New England to Georgia, the interior region had a common grievance against the coast, that it was generally deprived of its share of representation.[36]

[35] Turner, pp. 110-11.

[36] W. Smith, *A Brief State of the Province of Pennsylvania* (1755), charges that since 1723, when the assembly gained control of the purse and the right

The policy of exclusive tidewater statesmanship was urged in the Philadelphia Convention by Gouverneur Morris. "He thought property ought to be taken into the estimate [of apportionment] as well as the number of inhabitants. Life and liberty were generally said to be of more value than property. An accurate view of the matter would nevertheless prove that property was the main object of society. . . . If property was then the main object of government, certainly it ought to be one measure of the influence due to those who were to be affected by the government. He looked forward to that range of new States which would soon be formed in the West. He thought the rule of representation ought to be so fixed as to secure to the Atlantic States a prevalence in the national councils. The new States will know less of the public interest than these, will have an interest in many respects different, in particular will be less scrupulous of involving the community in wars the burdens and operations of which would fall chiefly on the maritime States. Provision ought therefore to be made to prevent the maritime States from being hereafter outvoted by them. He thought this might easily be done by irrevocably fixing the number of representatives which the Atlantic States should respectively have, and the number which each new State will have."[37] Again he argued that the western States would be unable to furnish "men equally enlightened" to participate in the work of government. "The busy haunts of men," he said, "not the remote wilderness, was the proper school of political talents. If the western people get the power into their hands they will ruin the Atlantic interests. The back members are always most averse to the best measures."[38]

The spokesman of the propertied and commercial classes, Morris had many followers in the convention. John Rutledge and

of voting money for the defense of the colony, proper defense measures have been neglected. It is alleged that this was a part of a scheme through which the Quaker minority controlling the legislature aims to prevent the loss of its power. The complaints of the interior counties will be found in *Votes and Proceedings*, etc., V.

[37] Farrand, I, pp. 533-4.

[38] *ibid.*, p. 583.

Pierce Butler of South Carolina saw the advantage to the slave-owning planters of apportioning representatives on a basis of wealth as well as the number of inhabitants.[39] Elbridge Gerry, who feared the influx of Scotch-Irish, French Huguenots and Germans along the frontier, pleaded that those who remained on the Atlantic seaboard might not "be at the mercy of the emigrants."[40] Before any arguments could be advanced on the democratic side, Morris had obtained the adoption of a report which allowed Congress "to regulate the number of representatives" in any new States which might be created, "upon the principles of their wealth and number of inhabitants." Since the Atlantic States would have control of the government from the outset, they could "take care of their own interest by dealing out the right of representation in safe proportions to the western States."[41]

It was only a temporary victory. Two days later the liberal view was introduced in the convention by Colonel Mason. "From the nature of man," he said, "we may be sure that those who have power in their hands will not give it up while they can retain it. . . . Ought we to sacrifice what we know to be right in itself, lest it should prove favorable to States not yet in existence? If the western States are to be admitted into a Union as they arise, they must, he would repeat, be treated as equals, and subjected to no degrading discriminations."[42] Mason was supported by Edmund Randolph, who observed that "Congress have pledged the public faith to the new States, that they shall be admitted on equal terms. They never would or ought to accede on any other."[43] Not only the abstract principle of right but a contractual obligation of the Congress under the Articles of Confederation also confronted the exclusive policy of Gouverneur Morris and the party of tidewater control.

[39] *ibid.*, pp. 534, 541.
[40] *ibid.*, II, p. 3.
[41] *ibid.*, I, pp. 559-60.
[42] *ibid.*, p. 578.
[43] *ibid.*, p. 580. For an account of the earlier developments in the public lands controversy, see J. C. Welling, "The States' Rights Conflict Over Public Lands," *American Historical Association Papers*, III, pp. 411 *ff.* See also "Papers of Charles Thomson," *New York Historical Society Collections*, 1878, pp. 141-6.

Congress had two months earlier been petitioned to provide for the opening of the territory in the valley of the Ohio River. A joint-stock company had been formed by two enterprising citizens of Massachusetts to promote the settlement of the unoccupied lands; eager, impoverished veterans of the Revolutionary War were ready to go and take possession at once. At their request the Ordinance for the Government of the Territory Northwest of the Ohio had been drafted and awaited the final vote. It contained in unmistakable terms the recognition of the equality of the western people with the inhabitants of the old thirteen States. On July 13, a quorum being present in Congress, the bill became a law. At almost the same hour, the Federal Convention resolved to apportion representatives solely on a basis of the number of inhabitants. This step having been taken, no further objection was interposed to writing into the Constitution provisions which opened the way to the admission of new States on terms of equality with those already in existence.[44]

The form of government set up in the Constitution was regarded by its founders as the only one which was "reconcilable with the genius of the people of America," and at the same time adequate to govern the large extent of territory within the United States. It was by them denominated republican. "As long as the offices are open to all men," said Hamilton, "and no constitutional rank is established, it is pure republicanism."[45] This concise definition is in no way inconsistent with the longer and more famous one by James Madison,[46] but it does not take into account the evils of democracy which practical arrangements were expected to cure. To convert theory into practice it was thought necessary to guard against abuse of power by the partition and limitation of authority. Stability was to be maintained in the government through the introduction of a system of checks and balances. The

[44] Rufus King, in the debates on the admission of Missouri into the Union, argued that the power of Congress to admit new States is conferred without limitation. *Life and Correspondence of Rufus King* (1894), VI, p. 691.

[45] Farrand, I, p. 432.

[46] *Federalist,* No. XXXIX.

result was to create precisely the form of government declared by Rousseau to be incompatible with the existence of liberty.

Unlike the French philosopher, the men of 1787 were confronted with a practical problem. Charles Pinckney told the constitutional convention that "all we have to do is to distribute the powers of government in such a manner, and for such limited periods, as while it gives a proper degree of permanency to the magistrate, will reserve to the people the right of election which they will not or ought not frequently to part with."[47] But the task was not so readily performed; conflicting forces had to be calculated and given their due weight in the political system under construction.

The crucial moment in the formation of the Constitution came in the debate on representation. Here the impact of the democratic spirit of the frontier and interior regions upon the conservatism of the seaboard was most direct. For thirty-one days the members of the convention struggled in the stifling summer heat of Philadelphia before they reached a solution of the difficulty. As Madison said, "the great difficulty lies in the affair of representation; and if this could be adjusted, all others would be surmounted."[48] In point of fact, the solution of this problem involved nothing less than the reconciliation of the American conception of democracy with efficient government.

The principle of representation formulated at Philadelphia regarded the institution solely as a substitute for legislation by direct action of the people. More than a hundred years earlier, Parliament had been described by John Selden as a meeting of representatives of the people made necessary "because the room will not hold all."[49] Through successive generations of American

[47] Farrand, I, p. 404.

[48] *ibid.*, p. 321.

[49] *Table Talk* (ed. Reynolds), p. 46. A theory of Parliament as a representative body was given by Sir Thomas Smith in the reign of Elizabeth. In his book, *De Republica Anglorum* (1583), he said of Parliament: "For every Englishman is intended to be there present, either in person or by procuration and attorneys, of whatever preëminence, state, dignity or quality soever he be, from the prince, be he King or Queen, to the lowest person of England. And the consent of Parliament is taken to be every man's consent." Book II,

colonists the idea remained unchanged. "What is the principle of representation?" said William Paterson at Philadelphia. "It is an expedient by which an assembly of certain individuals chosen by the people is substituted in place of the inconvenient meeting of the people themselves."[50] James Wilson "was of the opinion that the national legislative powers ought to flow immediately from the people, so as to contain all their understanding, and be an exact transcript of their minds."[51] This theory emphasizes the notion that representation is designed to secure in the government a reflex of the entire electorate rather than to generate an organ of control over the government.

Before we can accept the idea that the legislature can be a "transcript of the whole society," we must admit that the principle of representation is consistent with popular government. Exactly a quarter of a century before the Philadelphia Convention, Rousseau denied that the sovereignty which vests in the people could be represented any more than it could be alienated.[52] In his view, there could be no law which the people in person had not ratified. But Rousseau was himself unable to extend his theory beyond the confines of a city-state, "where everyone hastens to the assemblies." In a modern state of large area such perpetual referenda to the people are impracticable. It therefore follows that popular sovereignty implies representation.

The idea that the representative body will be a miniature of the electorate has the merit of simplicity. But it fails to achieve reality because the representatives are not always able or willing to reflect the opinions of their constituents. Any system of representative government depends in large measure for its success upon the men entrusted with its conduct. "It is a mistake," said Mercer of Maryland in the Federal Convention, "to suppose that the paper we are to propose will govern the United States. It is

Chap. I. But it would seem that Smith regarded Parliament as a court rather than a legislative assembly. McIlwain, *High Court of Parliament and Its Supremacy,* pp. 124 *ff.*

[50] Farrand, I, p. 561.

[51] *ibid.,* p. 141.

[52] *Social Contract,* Book III, Chap. XV.

the men whom it will bring into the government and interest in maintaining it that is to govern them. The paper will only mark out the mode and the form. Men are the substance and must do the business."[53]

The State governments had already been established upon the idea that the representatives in the legislatures would reflect accurately the sentiments of the electorate. Yet there was almost universal complaint that "the State legislatures drawn immediately from the people did not always possess their confidence." Gouverneur Morris warned the delegates assembled at Philadelphia that "the legislature is worthy of unbounded confidence in some respects, and liable to equal distrust in others. When their interest coincides with that of their constituents, as happens in many of their acts, no abuse of trust is to be apprehended. When a strong personal interest happens to be opposed to the greatest interest, the legislature cannot be too much distrusted."[54]

The danger to be guarded against was the growth in the representative body of what Bentham once defined as sinister interests. Interests adverse to those of the whole community had already reduced the government in some of the States to a condition of turbulence and anarchy. In the constitutional convention, James Wilson called attention to the fact that in these States "the legislatures are actuated not merely by the sentiment of the people, but have an official sentiment opposed to that of the general government and perhaps to that of the people themselves."[55] Paper-money legislation and stay laws enacted in the State legislatures indicated a solicitude for the debtor classes which was adverse to the general welfare.

Recognition of the danger did not, however, produce a remedy. Here the convention entered upon the realm of the impalpable. "With regard to the sentiments of the people," at the time of the convention, James Wilson "conceived it difficult to know precisely what they are. Those of the particular circle in which one moved

[53] Farrand, II, p. 289.
[54] *ibid.*, p. 104.
[55] *ibid.*, I, p. 358.

were commonly mistaken for the general voice."[56] Madison "observed that if the opinions of the people were to be our guide, it would be difficult to say what course we ought to take. No member of the convention could say what the opinions of his constituents were at this time; much less could he say what they would think if possessed of the information and lights possessed by the members here; and still less what would be their way of thinking six or twelve months hence."[57] If subsequent experience has proved anything, it is that the doubts which assailed the men of 1787 have become permanently fixed in American political speculation. No one can pretend today that the interests of the representative assembly are always in harmony with those of the electorate or that the power supposedly delegated by the people is not frequently perverted to vicious ends.

The only provision inserted in the Constitution for maintaining a proper responsibility of the representative to his constituents was that of frequent elections. "The House of Representatives," wrote the authors of the *Federalist,* "is so constituted as to support in the members an habitual recollection of their dependence on the people. Before the sentiments impressed on their minds by the mode of their elevation can be effaced by the exercise of power, they will be compelled to anticipate the moment when their power is to cease, when their exercise of it is to be reviewed, and when they must descend to the level from which they were raised; there to remain forever unless a faithful discharge of their trust shall have established their title to a renewal of it."[58] This argument seems almost specious in view of the fact that most of the State legislatures, which were so generally condemned in the Federal Convention, were chosen by annual elections. Indeed, Hamilton suggested that "frequency of elections tended to make the people listless to them; and to facilitate little cabals."[59]

Notwithstanding the unqualified approbation in the convention

[56] Farrand, II, p. 253.
[57] *ibid.*, p. 215.
[58] No. LVII.
[59] Farrand, I, p. 362.

of the idea of representation which aims to secure in the government a reflex of public opinion, the framers of the Constitution were unable to adapt the theory to the exigencies of the situation which confronted them. "The doctrine of representation," said James Wilson early in the debates, "is this—first the representative ought to speak the language of his constituents, and secondly that his language or vote should have the same influence as though the constituents gave it."[60] This interpretation, which is the only one consistent with the idea of representation as a substitute for direct action by the people, demands the apportionment of representatives on a basis of population. But the assent of the delegates from the smaller States could not be obtained to any practical arrangements which did not secure in at least one branch of the legislature the equal representation of the States.

Under the leadership of William Paterson a compromise was forced upon the convention whereby the States secured an equal representation in the Senate while the members of the House of Representatives were to be apportioned according to population. This was in effect a repudiation of Paterson's own principle of representation. "Mr. Madison reminded Mr. Paterson that his doctrine of representation, which was in its principle the genuine one, must forever silence the pretensions of the small States to an equality of votes with the large ones. They ought to vote in the same proportion in which their citizens would do, if the people of all the States were collectively met."[61] Nevertheless the delegates from the small States were determined to secure protection for their interests regardless of the principles that might have to be sacrificed.

Undoubtedly the Constitution would never have been accepted by the small States without this compromise. But it introduced at once into the government of the United States the great sinister interest of States' rights, which has since remained an obstacle to the development of a national sentiment which could be

[60] *ibid.*, p. 185.

[61] *ibid.*, p. 562.

reflected in Congress. "The State systems," wrote Henry Knox to Rufus King in the summer of 1787, "are the accursed things which will prevent our being a nation. The democracy might be managed, nay, it would be a remedy itself after being sufficiently fermented; but the vile State governments are sources of pollution, which will contaminate the American name for ages—machines that must produce ill, but cannot produce good."[62] Because the States have been so firmly entrenched behind the Constitution, the American people have never again been able to attain the political solidarity they once displayed so conspicuously in the Declaration of Independence.

The explanation for the constitutional position of the Senate was that it would not only be a check upon the hasty deliberations of the lower house but would also provide representation for the sovereignty of the States. "The sense of the States," it was argued, ought to be collected, not only to allow these entities to maintain their integrity but also to bring them to the support of the national government. John Dickinson "compared the proposed national system to the solar system, in which the States were the planets, and ought to be left to move freely in their orbits."[63] In order to secure the sovereignty of the States, he thought "the State legislatures ought to have some means of defending themselves against the encroachments of the national government."

In the effort to reflect in Congress the opinion of the State governments, as well as that of the people, it became necessary to modify the conception of the relation of the representative to his constituents. In the minds of the men of 1787, members of Congress were not to be simply the delegates of the people; for the purposes of government they were to be the people themselves. They were to be guided by "the deliberate sense of the community," but this was not to "require an unqualified complaisance to every sudden breeze of passion, or to every transient impulse which the people may receive from the arts of men, who flatter

[62] *Life and Correspondence of Rufus King,* I, p. 228.
[63] Farrand, I, p. 153.

their prejudices to betray their interests."[64] This is, in effect, to reject the conception of a restricted mandate which Burke had already condemned and which in a later day was to be excoriated by the younger Mill.

But senators were deemed to be "in quality of ambassadors of the States."[65] It was therefore considered entirely appropriate that they should receive instructions from the State legislatures which elected them. In 1788 the selection of Madison as senator from Virginia was successfully opposed by Patrick Henry on the ground that it was "doubted whether Mr. Madison will obey his instructions,"[66] and thereafter the State legislatures very freely instructed their senators, in some cases demanding the resignations of those who refused compliance.[67] It was not until the Whig Party, which opposed the "doctrine of instructions," came into power that the practice fell into disuse.

Despite the strength of the propertied classes in the convention, the adoption of the idea of representation was not conditioned upon the reflection of economic or occupational interests. Modern systems of representation in Europe have in most instances evolved out of the representation of three or more classes or estates. Frequently each class has not only been represented by persons of its own choice, but each class has had a house of its own through which the interests of the group were expressed in the government. European adaptations of the representative system have not sought to reflect the opinions of mere numerical aggregations of human beings considered apart from property and employment. On the contrary, they have reflected the senti-

[64] *Federalist,* No. LXXI. See also the debates in the first session of Congress on the proposal to amend the Constitution to permit the people "to instruct their representatives." *Annals of the First Congress,* I, pp. 761 *ff.*

[65] Elliott, II, pp. 18, 46; IV, pp. 123, 207.

[66] M. Conway, *Life and Letters of Edmund Randolph* (1888), pp. 120-1.

[67] For examples of instructions by State legislatures, see T. H. Benton, *Abridgment of Debates in Congress* (1857), XII, pp. 578-9; XII, p. 154, H. Niles, *Register,* XI, p. 407; XLVII, p. 317; LVI, p. 99; LVII, pp. 203, 308; LXIII, p. 247; LXV, pp. 381, 397. *Congressional Globe,* 28th Cong., 1 Sess., XIII, p. 250. *Senate Journal,* 33rd Cong., 1 Sess., p. 478. *ibid.,* 35th Cong., 1 Sess., p. 402.

ments and views of different estates or classes of men: clergy, nobility, landed gentry, burghers, and peasants.[68]

If it had been suggested to the leaders of the Federal Convention that special provision had not been made for the representation of the various economic interests in the United States, they would undoubtedly have been surprised. They thought that the representation of economic interests was secured from the very nature of the government itself. James Madison, although he accepted the rule of numbers as the basis of representation, believed that class distinctions would penetrate the legislative assemblies. "Many of the most important acts of legislation," he thought, would be "but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens." The different classes of legislators, he concluded, would be merely "advocates and parties to the causes which they determine."[69]

Perceiving the logical justification for group representation, Madison argued that the interests of no important class should be left entirely to the care of other classes. "It was politic as well as just," he said, "that the interests and rights of every class should be duly represented and understood in the public councils. It was a provision everywhere established that the country should be divided into districts and representatives taken from each, in order that the legislative assembly might equally understand and sympathize with the rights of the people in every part of the community. It was not less proper that every class of citizens should have an opportunity of making their rights be felt and understood in the public councils. The three principal classes into which our citizens were divisible were the landed, the commercial, and the manufacturing. The second and third classes bear as yet a small proportion to the first. The proportion will, however, daily increase. We see in the populous countries of Europe, what we shall be hereafter. These classes understand much less of each other's interests and affairs than men of the same class inhabiting different districts. It

[68] Beard, *Economic Basis of Politics* (1922), Chap. II.
[69] *Federalist*, No. X.

is particularly requisite therefore that the interests of one or two of them should not be left entirely to the care or impartiality of the third."[70]

At the same time, Madison "could not agree that any substantial objection lay against fixing numbers for the perpetual standard of representation."[71] He later examined the question with great care and concluded that "under every view of the subject, it seems indispensable that the mass of citizens should not be without a voice in making the laws which they are to obey, and in choosing the magistrates who are to administer them, and if the alternative be between an equal and uniform right of suffrage for each branch of the government and a confinement of the *entire* right to a part of the citizens, it is better that those having the greater interest at stake, namely that of property and persons both, should be deprived of half their share in the government than that those having the lesser interest, that of personal rights only, should be deprived of the whole."[72]

In theory the members of the Philadelphia Convention clung to the idea that the basis of representation should rest solely on the number of inhabitants. The departure from the principle in the establishment of equal representation in the Senate was forced by the necessity of reconciling conflicting interests. At the same time it was fully recognized that the sacrifice of principles to a supposed interest was fraught with danger.

The evil inherent in the scheme of equal representation was vigorously attacked by Wilson. "The rule of suffrage," he said, "ought on every principle to be the same in the second branch as in the first branch. If the government be not laid on this foundation, it can be neither solid nor lasting. Any other principle will be local, confined and temporary. . . ."[73] If equality in the second branch was an error that time would correct, he should be less anxious to exclude it, being sensible that perfection was unattain-

[70] Farrand, II, p. 124.
[71] *ibid.*, I, p. 585.
[72] *ibid.*, III, pp. 454-5.
[73] *ibid.*, I, p. 483.

able in any plan; but being a fundamental and a perpetual error, it ought by all means to be avoided. A vice in the representation, like an error in the first concoction, must be followed by disease, convulsions, and death itself."[74] Selfish particularism is an ill which seldom finds a cure unless administered by a despot.

Gouverneur Morris was even more vehement in denouncing the danger threatened by the protagonists of equal representation. "Good God, Sir," he cried, "is it possible they can so delude themselves? . . . It had been said that the new government would be partly national, partly federal: that it ought in the first quality to protect individuals; in the second, the States. But in what quality was it to protect the aggregate interest of the whole?" Morris begged the convention to look at Germany. "The same circumstances," he declared, "which unite the people here, unite them in Germany. They have there a common language, a common law, common usages and manners, and a common interest in being united; yet their local jurisdictions destroy every tie. The case was the same in the Grecian States. The United Netherlands are at this time torn in factions. With these examples before our eyes, shall we form establishments which must necessarily produce the same effects? It is of no consequence from what districts the second branch shall be drawn, if it be so constituted as to yield an asylum against these evils."[75]

Yet the delegates who withstood the cogent arguments of Wilson and Gouverneur Morris could justify their position by the fact that the State systems enjoyed the confidence of the people, while the Congress under the Articles of Confederation was everywhere distrusted and despised. James Wilson reviewed the melancholy course of disruption which had in a few years destroyed the solidarity of the American nation. "Among the first sentiments expressed in the first Congress," he said, "one was that Virginia is no more, that Massachusetts is no more, that Pennsylvania is no more, etc. We are now one nation of brethren. We must bury all local interests and distinctions. This language continued for some

[74] Farrand, II, p. 10.

[75] *ibid.*, I, p. 552.

time. No sooner were the State governments formed than their jealousy and ambition began to display themselves. Each endeavored to cut a slice from the common loaf, to add to his morsel, till at length the confederation became frittered down to the impotent condition in which it now stands."[76] To be sure, the convention had been called to alter the Articles of Confederation so as to arrest the centrifugal forces of State loyalty. But in 1787 State boundaries were important factors in separating the people of the United States. State governments were known and trusted; they had carried the people through the war with Great Britain while the impotent Congress of the Confederation had been unable to achieve the objects for which it was created. It followed that not only did men distrust a national government, but they also failed to understand that two jurisdictions largely coordinate could work toward a similar end. They imagined that coordination meant antithesis, and feared lest the surrender of a portion of the power wielded by the States would end in the destruction of personal liberty. It could therefore be argued that the national government must rest in part upon the States.

The Constitution was, from the point of view of eighteenth century political theory, a democratic document. It is true, the democratic character of the instrument depends largely upon the failure to lodge political power in the hands of special classes or interests. But it was recognized that with unrestricted suffrage, the apportionment of representation according to the rule of numbers, and the admission of new States on a parity with those already established, the Constitution would not endanger the growth of economic and social equality. Harrington in the seventeenth century had predicated the success of republican institutions upon the widespread ownership of land.[77] In similar vein, Madison declared that "the extent and fertility of the western soil would for a long time give to agriculture a preference over manufactures. . . . The value of labor might be considered as the principal criterion of wealth and ability to support taxes; and this would

[76] *ibid.*, p. 166.

[77] *Oceana* (ed. Morley), p. 19.

find its level in different places where the intercourse should be easy and free, with as much certainty as the value of money or any other thing. Wherever labor would yield most, people would resort, until the competition should destroy the inequality."[78]

For a period extending over ninety-six days the Federal Convention was engaged in its momentous task. Human reason and human prejudices played their part in framing the great document which has since served as the basis of government in the United States. Yet there were added few provisions which could not be found in the State constitutions or in the Articles of Confederation. The framers were dependent largely upon the political experience of their own immediate past; they were not seeking innovations. As John Dickinson said in the course of the debates: "Experience must be our only guide. Reason may mislead us. It was not reason that discovered the singular and admirable mechanism of the English Constitution. It was not reason that discovered or ever could have discovered the odd, and in the eyes of those who are governed by reason, the absurd mode of trial by jury. Accidents probably produced these discoveries, and experience has given sanction to them. This then is our only guide."[79] Human ingenuity was limited in the main to adapting to the requirements of a new government institutions that were very old. The growth of those institutions may be traced back through the State constitutions, the colonial charters and the charters of the trading companies, to their origins in the great landmarks of English constitutional development. The continuity of this development was not broken in 1787. As Madison said in the *Federalist*: "The truth is, that the great principles may be considered less as absolutely new, than as the expansion of principles which are found in the Articles of Confederation. . . . If the new Constitution be examined with accuracy and candor, it will be found that the change which it proposes consists less in the addition of *New Powers* to the *Union*, than in the invigoration of its *Original Powers*."[80]

[78] Farrand, I, p. 585.
[79] *ibid.*, II, p. 278.
[80] *Federalist*, No. XLV.

The crowning feature of the American political system as it was worked out during the summer of 1787, from the point of view of popular government, is the clear distinction between the sovereignty which vests in the people and the powers which are delegated to the government. When the members of the convention adjourned on the Fourth of July to celebrate the anniversary of the Declaration of Independence, they heard with approval from the lips of Dr. Benjamin Rush the doctrine that "all power is derived from the people; they possess it only on the days of their elections. After this, it is the property of their rulers."[81] The distinction made by Rousseau between state and government is here preserved. But the people cease to be active in political affairs as soon as the government has been set up, except at the periodical elections. By the act of setting up a government the people divest themselves of the rights which they transfer to the government; the function of governing becomes lodged exclusively in the government. The true distinction between the democracies of ancient Greece and the American government, declared the writers of the *Federalist,* "lies *in the total exclusion of the people, in their collective capacity,* from any share in the *latter.*"[82]

The political philosophy of which this type of state is the central object was expounded by John Locke in the seventeenth century. In Locke's theory, sovereignty can exist nowhere except in the community as a whole. This is the original and supreme will which organizes the government and defines its just powers. It is compatible with almost any variety of institutions, so long as it is recognized that the rulers are the trustees of the people who delegate their powers to them. But the community retains the reserve power of revolution which may be exercised whenever the rulers have so far abused the trust confided in them that it becomes necessary for the people to dispose their powers in another way. In practice the formation or alteration of a constitution has proved to be identical with an act of revolution. Thus through the theory

[81] Niles, *Principles and Acts,* etc., p. 234.
[82] *Federalist,* No. LXIII.

of Locke democracy is revealed rather as a spirit than as a special set of institutions.

The realization of democracy in the United States was an achievement of the nineteenth century. It was fully defined in the words of Lincoln as he gazed upon the resting-places of the heroic dead at Gettysburg,—"government of the people, by the people, and for the people." But this impressive formula does no more than reflect the liberal spirit of the Convention of 1787. With the settlement of the interior valleys of the West and the admission of new States into the Union, aristocratic pretensions came to be disregarded. The sort of equality contemplated by the Declaration of Independence gradually permeated the whole political system.

CHAPTER IV

AMERICAN INDIVIDUALISM

THE growth of democracy in the United States was accompanied by an intensive cultivation of the principle of individualism. This was due largely to the peculiar characteristics of the nation's economy. The abundance of free land, the extent and richness of the natural resources, the enterprise and optimism of the people, and the scope for individual initiative combined to give the United States an era of unparalleled prosperity. "The law of diminishing returns, the Malthusian doctrine of population, the law of the tendency of profits towards a minimum, the wages fund doctrine, seemed to have no application to this country."[1] The followers of Hamilton and Jefferson, despite the differences in their political views, had certain common interests and opinions. "The men of both parties were individualistic in spirit, and they were interested in the great American task of improving their own condition in the world. They both wanted a government which would secure them freedom of action for this purpose."[2]

The revolutionary patriots had emphasized the individualism which lay in the doctrine of natural rights. Men like Samuel Adams conceived natural rights to be guaranteed by the British constitution.[3] But the radical Thomas Paine thought of the rights of man as existing independently of charters and constitutions.[4] His conception of popular sovereignty involved the basic notion that rights inhere in the individual, and governments exist only

[1] J. K. Ingram, *History of Political Economy* (1915), p. 278. See also C. F. Dunbar, "Economic Science in America," *North American Review*, CXXII, pp. 124-54.
[2] H. Croly, *The Promise of American Life* (1909), p. 32.
[3] *Writings*, I, p. 47.
[4] *Writings* (ed. Conway), I, pp. 67 *ff.*; II, pp. 133 *ff.*

for the further protection of individual rights. This idea was in the mind of Jefferson when he wrote into the Declaration of Independence that all men "are endowed by their Creator with certain inalienable rights," to secure which governments were instituted.

Both Jefferson and Hamilton subscribed to the doctrine of natural rights, but neither permitted speculative theories to interfere with practical statesmanship. Hamilton once remarked that he was "disposed not to dwell long on curious speculations, or pay much attention to modes or forms, but to adopt a system sanctioned by experience, adapt it to the real state of the country, and depend on probable reasonings for its operation and result."[5] His passion for order in human affairs led him to emphasize the necessity for strong government. The individual, according to Hamilton, was the essential unit in the state, but individual rights were inseparably connected with those of government; the security of the one could not be separated from that of the other.[6] Jefferson, on the contrary, never forgot that government depends upon the individuals from whose consent it derives its just powers. He declared the will of the people to be "the only legitimate foundation of any government," and added that "to protect its free expression should be our first object."[7] Believing that government should interfere as little as possible with the individual, Jefferson demanded that government should embody the principle of majority rule. At the same time he declared that the will of the majority "to be rightful must be reasonable; that the minority possess their equal rights, which equal law must protect, and to violate would be oppression."[8] It is apparent that Jefferson was not wholly prepared to define his democracy in terms of unlimited majority rule. A qualification in behalf of reasonableness must temper the will of a popular majority. This is to admit an exception in favor of natural rights.

The political creed of the American democrat, as formulated by

[5] *Works*, I, p. 428.
[6] *ibid.*, VIII, p. 138.
[7] *Works* (ed. Washington), IV, p. 379.
[8] *Works* (ed. Ford), VIII, p. 2.

Thomas Jefferson and his followers emphasized the self-sufficiency of the average man. Jefferson from his study of the French physiocrats became convinced that political virtue could be expected only in an agricultural community. The ideas of Quesnay and Turgot, together with his own observations abroad, led him to trace the sources of political corruption to the piling up of people in large cities.[9] A wider experience in American statecraft brought Jefferson somewhat reluctantly to admit manufactures, commerce, and navigation, along with agriculture, as the four pillars of our prosperity.[10] But it required the full course of the devastating wars of Napoleon to bring him to the conclusion "that manufactures are now as necessary to our independence as to our comfort."[11] At the same time, Jefferson never relinquished his belief that agriculture was the only enduring basis of republican government.

The ideal of a self-contained community which Jefferson entertained did not require the individual to concern himself with matters beyond the range of his immediate experience. It was therefore possible for Jefferson to exhibit unbounded confidence in the people as the depositaries of the public interests. "We both love the people," he wrote to Dupont de Nemours, "but you love them as infants whom you are afraid to trust without nurses, and I as adults whom I freely leave to self-government."[12] At the same time, he recognized that in the United States democracy was favored by economic conditions. The widespread ownership of land and the freedom of economic opportunity afforded security against internal disorder. Individuals as favorably situated as the people of this country, he thought, "may safely and advantageously reserve to themselves a wholesome control over their public affairs and a degree of freedom, which, in the hands of the canaille of Europe, would be instantly perverted to the demolition of everything public and private."[13]

The aim of Jefferson's statesmanship was to provide "a wise

[9] *ibid.*, IV, p. 480.
[10] *ibid.*, VIII, p. 123.
[11] *ibid.*, X, pp. 8-10.
[12] *ibid.*, p. 23.
[13] *ibid.*, IX, p. 428.

and frugal government, which shall restrain men from injuring one another, shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned."[14] His conception of government was always colored by his admiration for the New England towns. The success of these institutions led him to argue for a system of local government in Virginia modelled after the New England type. The fundamental powers of government, Jefferson thought, ought always to remain in the hands of officers responsible immediately to the people. "It is not by consolidation, or concentration of powers, but by their distribution, that good government is effected," he wrote in his *Autobiography*. "Were not this great country already divided into States, that division must be made, that each might do for itself what concerns itself directly, and what it can do so much better than a distant authority. Every State again is divided into counties, each to take care of what lies within its local bounds; each county again into townships or wards, to manage minuter details; and every ward into farms, to be governed each by its individual proprietor. Were we directed from Washington when to sow, and when to reap, we should soon want bread. It is by this partition of cares, descending in gradation from general to particular, that the mass of human affairs may be best managed for the good and prosperity of all."[15] Together with the argument for a decentralized government subject to popular control, Jefferson demanded that government should interfere as little as possible with the affairs of the individual. "Let the general government be reduced to foreign concerns only," he said, "and let our affairs be disentangled from those of all other nations, except as to commerce, which the merchants will manage the better, the more they are left to manage for themselves, and our general government may be reduced to a very simple organization, and a very unexpensive one."[16]

Hamilton, with a more prophetic vision of the country's future,

[14] *Works* (ed. Ford), VIII, p. 4
[15] *ibid.*, I, p. 113.
[16] *ibid.*, VII, p. 452.

observed that the safety of the people depended upon the strength of the government.[17] "It is an unquestionable truth," he said, "that the body of the people in every country desire sincerely its prosperity. But it is equally unquestionable that they do not possess the discernment and stability necessary for systematic government."[18] He placed little or no confidence in the self-governing ability of the small farmer, and ninety per cent of the population was then agricultural. "Take mankind as they are," Hamilton remarked in the Federal Convention, "and what are they governed by? Their passions. . . . Our prevailing passions are ambition and interest; and it will ever be the duty of a wise government to avail itself of those passions, in order to make them subservient to the public good."[19] A definite obligation was therefore imposed upon government not only to control the passions of men in behalf of peace and order but also to divert them to promote the public welfare.

The triumph of Jefferson and the defeat of Hamilton enabled the principle of individualism to enjoy free play. The growth of popular government in the United States was thereafter to be measured only by the capacity of the people to operate the political machinery. The Hamiltonian ideal of a strong government in the hands of a few was displaced in favor of the ideal of a popular government the strength of which depended upon the character and intelligence of the electorate.

In an address to his constituents, a partisan of Jefferson in 1807 described the cleavage between his party and that of Hamilton. "These two parties," he said, "so far as principle was concerned in their formation and continues to separate them, appear to be distinguished by their different views of the nature of a republican government, and of the means of acquiring national dignity. The Federalists apprehend that no new lights are to be admitted in the administration of political affairs, but that we are to ascend the ladder of national prosperity and glory by the same steps which others have trodden before us. The Republicans are persuaded that

[17] *Works*, I, p. 459.
[18] *ibid.*, p. 450.
[19] Farrand, I, p. 381.

nations as well as individuals are progressive existences, and that the social state may be capable of amelioration so long as the human understanding is susceptible of illumination, and the moral faculty of improvement. That the strength and energy of a nation is to be estimated more by the affections of the people than by the exterior means provided for its defense; and that individual liberty is more precious than all the apparatus of power. Federalists seem to have moderated their zeal for liberty, and the unalienable rights of man, by an ingenious distinction between theory and practice, between that which they allow to be eternally true and that which, though false, is the best that can be adapted to the corruptions of mankind. Republicans believe that the standard of truth should never be abandoned, but that all the good which times and circumstances afford should be constantly pursued."[20]

A more complete, but not more accurate, exposition of the political philosophy of the Republicans is contained in the writings of John Taylor of Caroline County, Virginia. Indeed, Taylor has very appropriately been called the philosopher of Jeffersonian democracy.[21] He was constantly in correspondence with the leaders of his party in Congress and supplied not only the arguments for the repeal of the Judiciary Act of 1801 but also the language in which John Breckinridge made the motion.[22] Jefferson once wrote that "Colonel Taylor and myself have rarely, if ever, differed in any political principle."[23] In somewhat more than three thousand pages of writing, marred by dull and unnecessary verbiage, Taylor developed the principles which animated the Republican party.[24]

The exposition of Jeffersonian democracy was part of an elab-

[20] E. Elmer, *Address to the Citizens of New Jersey* (1807). Compare with Jefferson's own statement of the differences between the parties. *Works* (ed. Washington), VII, p. 290.

[21] B. F. Wright, Jr., "The Philosopher of Jeffersonian Democracy," *American Political Science Review,* XXII, pp. 870 *ff.*

[22] Carpenter, *Judicial Tenure in the United States,* p. 66.

[23] *Works,* X, p. 170.

[24] The more important works of Taylor are *An Inquiry into the Principles and Policy of the Government of the United States* (1814), *Construction Construed, and Constitutions Vindicated* (1820), *Tyranny Unmasked* (1822), and *New Views of the Constitution of the United States* (1823).

orate criticism of certain theories found in John Adams's *Defence of the Constitutions of the United States* (1787-1788) and in the *Federalist*. It was the object of Adams to set forth the foundations of a political society based upon an aristocracy of wealth and maintained through a constitution which effected a balance of conflicting interests represented as distinct orders. Adams pictured a society in which the chief contending classes were the rich and the poor. Between these classes conflict inevitably leads, if unchecked, to one of two results. Either the rich will increase their wealth at the expense of the poor, or they will be despoiled by the poor. The latter is the usual course in a simple democracy where the majority, unchecked except by moral considerations, is permitted to rule. Adams proposed to escape the threatened evils by giving the rich and the poor representation as distinct orders in the government. Further checks upon the contending classes were to be established in the form of an executive holding office for a long period and an independent judiciary which should exercise control over all branches of the government. The fundamental defect in the system of Adams was that his society and his balanced government were static. New and unusual modes of acquiring wealth were not considered nor was the possibility of a general improvement in the social and intellectual conditions of society contemplated.[25]

This defect in the scheme of Adams furnished Taylor the opportunity to define what he conceived to be the more enlightened and progressive theory underlying the Jeffersonian system. "Mr. Adams," he remarked, "considers our division of power as the same principle with his balance of power. We consider these principles as opposite and inimical. Power is divided by our policy, that the people may maintain their sovereignty; by the system of orders, to destroy the sovereignty of the people. Our principle of division is used to reduce power to that degree of temperature which may make it a blessing and not a curse. . . . The principle of its division among orders is to erect an omnipotent power, able,

[25] Beard, *Economic Origins of Jeffersonian Democracy* (1915), Chap. XI; C. M. Walsh, *The Political Science of John Adams* (1915), *passim*.

like an irresistible conflagration, to consume everything in its way."[26]

Taylor apparently overlooked the fact that the Massachusetts statesman was concerned solely with the separation and balance of power among the three departments of the same government. Throughout his work Adams was dealing with a problem of governmental construction, whereas the Virginian was concerned with the division of power between the government and the people and between the State and national governments.[27] "Our policy," said Taylor, "divides power, and unites the nation in one interest. Mr. Adams's divides a nation into smaller interests, and unites power. By our policy, power having been first sparingly bestowed on the government, is next minutely divided, and then bound in the chains of responsibility. . . . Our policy does not confide the powers withheld by the constitution to the protection of any theory of balance. The government is not made amenable to itself. If it usurps a power withheld, by whom is it to be restrained? 'Not by the people (says Mr. Adams), they are no keepers at all of their own liberties.' And upon the credit of such an assertion, he contends for a government of orders, as if power would be a safe centinel over power, or the devil over Lucifer. But our policy considers the physical force of an armed nation, and the moral force of election and division, as better centinels. Both arms and the right of suffrage ought, however, to be taken from the people if they are their own worst enemies."[28]

The maintenance of a proper division of powers in the United States, according to Taylor, was to be found in a mutual right of control by the State and national governments.[29] His later writing was devoted largely to the task of developing the States' rights issue. With great eagerness he seized upon the idea that the United States Constitution established a federal rather than a national

[26] *Inquiry*, p. 400.
[27] Wright, p. 878.
[28] *Inquiry*, pp. 428-9.
[29] *Tyranny Unmasked*, pp. 260 *ff.*; *New Views of the Constitution of the United States*, pp. 147, 176-7.

government, and proceeded to elaborate the idea of the concurrent majority which Calhoun in a later day was to adopt.[30] But the later work of Taylor belongs to the domain not of political theory but of constitutional law.

Although Taylor objected to John Adams' appeal to the law of nature, he did not hesitate to revert to the same principle himself. "The basis of our policy," he said, "like the basis of modern philosophy, is the constancy of nature, in her moral as well as in her physical operations. . . . Let the intellectual, like the material philosopher, reason from facts, and the phenomena of mind will become as well understood for temporal purposes as those of body. A law of nature constitutes truth."[31] But Taylor held a far different view of natural law than that of Adams. The Massachusetts statesman regarded natural law as imposing inequality upon mankind, a clear contradiction of the principles of the Declaration of Independence.[32] Taylor, on the contrary, appealed to the law of nature as embodied in the radical theory of the revolution to emphasize the political equality of men. "A political equality of rights among men," he said, "is founded in a general law of nature."[33]

Political equality was essential to the sovereignty of the people and the maintenance of popular government. "The sovereignty of the people," Taylor wrote, "arises, and representation flows, out of each man's right to govern himself. With this individual right, political structures are built. Individuals, in forming a society, may arrange their rights in such forms as they please. . . ."[34] Societies may give legislation whatever form they prefer. They may legislate by the majority of individuals. They may allot themselves into centuries or districts, and legislate by a majority of sections. Or they may legislate by representatives deputed aggregately or by sections. . . . Voting in sections is as complete an exercise of the natural right as voting individually. Election by section is equiva-

[30] See W. E. Dodd, "John Taylor of Caroline, Prophet of Secession," *John P. Branch Historical Papers*, II, pp. 214 *ff.*

[31] *Inquiry*, p. 402.

[32] *Works*, VI, p. 453.

[33] *Inquiry*, p. 404.

[34] *ibid.*, p. 412.

lent to aggregate election. But all natural rights are individual, and this individuality is the substratum of our policy."[35]

In stressing individual rights Taylor was reviving the old principles of 1776. Indeed, he argued that the Declaration of Independence was the basis of American government. "If the Declaration of Independence is not obligatory," he wrote, "our entire political fabric has lost its magna charta, and is without any solid foundation. But if it is the basis of our form of government, it is the true expositor of the principles and terms we have adopted."[36] Taylor's argument appeared at the precise moment when the great document of the revolution was being taken up in the schools and when its phrases were accepted as embodying realities never cherished by its framers.[37] Individualism in terms of the revolutionary doctrine of natural rights continued to engage the attention of men, although the political circumstances under which it had grown up were radically altered.

Following the War of 1812 the people of the United States entered upon a new era. The advance of the pioneers subdued the Indians, cleared the forests, and established new settlements. As each decade saw the frontier ever receding farther from the Atlantic seaboard there was evidenced a growth in prosperity and an improved standard of living among the people. The hardy settler might from abject poverty arrive at comfort within a few years and even enjoy luxury for a brief period before being gathered to his fathers. But the struggle to subdue the wilderness with insufficient resources in both capital and men impeded the general acceptance of a policy of *laissez faire*, notwithstanding the individualistic tendencies bred by the frontier.[38] Government aid was required not only for roads, but also for canals and other works of internal improvement. Industrial enterprises, which had been greatly expanded during the Napoleonic wars, found new markets for their goods in the growing West. In order to hold the gains

[35] *Inquiry*, pp. 413-14

[36] *New Views of the Constitution of the United States*, p. 2.

[37] A. T. Hadley, *Undercurrents in American Politics* (1915), pp 15-16.

[38] A. N. Holcombe, *Foundations of the Modern Commonwealth* (1923), p. 421.

thus made against the recovery of European industry, the manufacturers of the United States demanded the assistance of a protective tariff.

Confronted by new economic conditions, the Jeffersonian principle of governmental non-interference broke down. It was not, however, replaced by any new set of principles. Conclusive and mouth-filling phrases served to formulate the political ideas of a people who were in each year growing more prosperous and enjoying an improved standard of living. The belief was general that if people remained poor it was their own fault. Political issues turned solely upon what government might do to further material prosperity. The florid oratory of the day was served by political expediency or embellished with meaningless rhetorical flourishes borrowed from the earlier doctrines of natural rights.

When the politicians turned to the question of a protective tariff they made no attempt to subject to scientific analysis the concepts with which they dealt. Henry Clay, under pressure from the West for legislation which would bring the products of the factory to the farm, went from free trade to protection with an amazing disregard for the logical quality of his arguments or the soundness of his propositions.[39] Webster, who opposed Clay in the tariff debates of 1824, four years later became an advocate of high tariffs on the ground that New England had become protectionist in order to gratify the demand from the West for manufactured goods. But he saw no reason either to engage in critical examination of the basis upon which a protectionist policy should rest or to reconcile his position with the principles laid down in his earlier argument.[40] Webster joined with the other members of Congress from New England, the Middle States, and the West, who "vied with one another in raising protective duties, by a wild log-rolling process, on the different articles in which their constituents were respectively interested."[41] A hard materialism thus

[39] *Life and Speeches of Henry Clay* (1843), I, pp. 219-66.
[40] *Works* (1851), III, pp. 94 *ff.*, 228 *ff.*
[41] C. Schurz, *Henry Clay* (1887), I, p. 287.

crept into American politics unrelieved by any professions or boasts of purity of motives.

The economists, who might be expected to furnish the scientific thought lacking in the politicians, did little to remedy the defects in the methods of political reasoning. Daniel Raymond, whose *Thoughts on Political Economy* first appeared in 1820, did recognize the anomaly of protection in an individualistic society. But he advocated a scheme of governmental interference so far in advance of his time that he had little influence on American thought.[42] Francis Wayland a little later opposed the protective tariff with arguments drawn from Adam Smith. At the same time he argued that government should promote industry by originating knowledge which must otherwise be obtained at great individual expense—by experimental farms, of which the results should be registered and published, by experimental manufactures, which might show, from time to time, what branches of manufacturing could be profitably introduced into a country, and how far they might be most successfully conducted.[43] At about the same time that Wayland was writing, Henry Vethake at the University of Pennsylvania was rendering himself unpopular with the vested interests of his State by opposing the protective tariff.[44] But the most prolific as well as the most influential economist in the United States was Henry C. Carey, whose most mature and

[42] C. P. Neill, "Daniel Raymond, an Early Chapter in the History of Economic Theory in the United States," *Johns Hopkins University Studies,* XV, pp. 225, 241. Raymond discusses agriculture, manufactures and commerce in their influence upon national wealth. Each, he says, is but a part of one great system, and wise legislators will encourage or restrain them in such a way as will best advance national wealth and prosperity. "Private citizens can only be expected to be wise for themselves—it is not their duty to look after the public interests—they are not the conservators of national wealth. This belongs to the department of legislation. If, from particular circumstances . . . one species of industry is more profitable than another, it must be expected that individuals will embark in it, without any regard to the evil consequences it may produce to succeeding generations; but it does not become a legislator, either to be blind to their consequences, or to guard against them." *Thoughts on Political Economy* (1823 ed.), II, p. 166.

[43] *Elements of Political Economy* (1837), p. 340.

[44] *Principles of Political Economy* (1838), pp. 248 *ff.*

comprehensive work appeared in 1858.[45] Carey had already produced a study of the tariff which was remarkable for the use made of statistical data.[46] In the beginning, Carey was an earnest advocate of free trade but came around to the belief in protection as a necessary form of intervention to prevent private advantage from working public mischief. He attributes his conversion on the question to his observation of the effects of liberal and protective tariffs respectively on American prosperity. From his interpretation of American history one would gather that protection was all that was needed in the United States for happiness to reign in every breast and joy to sit in every face.[47] But Carey's sincerity is open to question, and it seems more probable that he was influenced to advocate protection because the economic interests of Pennsylvania, where he lived, clamored for high tariffs.[48] At any rate, the economic thought of Carey is no more consistent than the arguments advanced by the politicians in Congress.

The confusion among the economists was due chiefly to the failure of the older sources of political economy to produce principles applicable to the changing conditions in the United States. Doctrines of *laissez faire* and governmental non-interference were drawn from the physiocrats or from Adam Smith. The teachings of the physiocrats had a direct and compelling appeal as long as agriculture remained the only important means of livelihood. To the men who had been trained in the eighteenth century American colleges, physiocratic doctrines harmonized with the philosophy of deism in which they had been steeped. According to the physiocrats, there are certain immutable and unerring laws of nature which form the test of any economic truth. Nature is the first term in the physiocratic speculations, but back of nature and her

[45] *Principles of Social Science* (3 vols.). See also C. H. Levermore, "Henry C. Carey and His Social System," *Political Science Quarterly*, V, pp. 553-82.
[46] *The Harmony of Interests* (1851).
[47] *Principles of Social Science*, II, p. 438.
[48] T. E. Cliffe Leslie, *Essays in Political and Moral Philosophy* (1879), p. 146. An analysis of the doctrines of Carey will be found in J. Jenks, "Henry Carey als Nationalökonom," *Sammlung nationalökonomischer und statistischer Abhandlungen*, ed. Conrad, IV, pp. 1-158.

works stands the Creator, by whose omniscient and benevolent power the order of nature has been established. The conception of the Creator is essentially deistic; God stands apart from the course of nature which He has established, and keeps His hands off.[49] The physiocrats also emphasized in their political doctrine the formation of society through contract. Government is a necessary evil; the authority established through consent of the governed should be limited to the amount of interference absolutely necessary to secure the fulfilment of the contract.

The theological element in the physiocratic system reappeared in American economic thought. It had in its passage across the Atlantic merged with the assumption of an invisible hand directing to the general good the efforts of individuals seeking their own gain. This latter idea is stated in Adam Smith's *Wealth of Nations*, although it is not essential to the economic philosophy set forth in the book. To the clergymen who were in this country teaching and writing upon the subject of political economy, the theological implications were peculiarly important. Francis Wayland in the preface to his book declared that "the principles of political economy are so closely analogous to those of moral philosophy that almost every question in the one may be argued on grounds belonging to the other." At the hands of sectarian ministers the academic treatment of economics tended to crystallize the principles of the older economists into divine laws. "If the footsteps of providential intelligence be found anywhere upon this earth," wrote the last of the clerical economists, "if God's goodness be anywhere discernible, they are discernible, and are found in the fundamental laws of society."[50]

Neither the physiocrats nor the author of the *Wealth of Nations* afforded economic doctrines adequate to the demands of the increased production of wealth in the United States. For that matter, they were unable to keep pace with the industrial developments

[49] T. Veblen, "The Preconceptions of Economic Science," *Quarterly Journal of Political Economy*, XIII, pp. 130-1.

[50] A. L. Perry, *Elements of Political Economy* (1866), p. 26. See also T. E. Cliffe Leslie, "Political Economy in the United States," *Fortnightly Review*, XXIV, pp. 488-508.

in England. "The early nineteenth century English economists deduced their doctrines, not from the study of the works of their predecessors, but from the actual experience of England during the war."[51] In the United States the ideas of the older economists lingered in the academic classroom but were scorned among the politicians and men of business. To Willard Phillips, who resigned his position in Harvard College to become a legislator and a jurist, the current economic teachings were "groundless postulates and sophistry."[52]

The inability of the older economists to supply principles applicable to the United States led to the rise of a new school of political economy. Friedrich List, a distinguished German scholar who spent the years from 1825 to 1830 as an exile in this country, gave to it the name national economy. In a series of papers entitled *American Political Economy*, he attacked Adam Smith on the ground that his system is individual, not political, economy. The *Wealth of Nations*, he said, "is a mere treatise on the question: how the economy of the individuals and of mankind would stand if the human race were not separated into nations, but united by a general law and by an equal culture of the mind. . . . To complete the science we must add the principles of national economy," which arises with the idea of nations.[53]

National economy must find its principles by deductions from a study of the actual conditions in a country. "In all modifications of the tariff," wrote Nathaniel Ware, "in all propositions to promote agriculture, commerce, or manufactures; in all laws or arrangements that go to affect labor, or change the order of things, the only question should be, Do the circumstances of the country favor it? Is a case made out to fit or call for the measure in question, and what is the real condition of things in reference to the proposition, not what did Adam Smith or Mr. Say write or lay down."[54]

[51] E. Cannan, *History of the Theories of Production and Distribution in English Political Economy from 1776 to 1848* (1903), p. 148.
[52] *Propositions Concerning Protection and Free Trade* (1850). Phillips states his earlier position in his *Manual of Political Economy* (1828).
[53] List's papers are reprinted in M. E. Hirst, *Life of Friedrich List* (1909).
[54] *Notes on Political Economy* (1844), p. 4.

But men like Ware founded their arguments on expediency; List based his ideas upon his theory of nationality.

The thought of the national economists led directly to protection and the abandonment of governmental non-interference. The fundamental notions upon which their system was constructed had already been set forth in Hamilton's famous *Report on Manufactures*. Indeed, the report was republished at Philadelphia in 1824 and again in 1827 as part of the protectionist propaganda for higher tariff duties.[55] Unlike the mercantilists of the seventeenth century, however, the American economists regarded the unity of interest throughout the entire country. Within the United States was a great free-trade area the economic interests of which were to be furthered through protection from foreign competition.[56] The full fruition of the doctrine of the national economists was attained in the American system of Henry Clay.[57]

It was the misfortune of Clay that he reverted to calling names instead of formulating arguments. Free trade he described as the "British colonial system" in contradistinction to the protective "American system." But no argument in behalf of protection could shut out the fact that American prosperity had arisen without the aid of the tariff. The foundations of this prosperity were laid in the freedom of economic opportunity, the ready acquisition of unimproved lands, and the democratic character of our government. "These are the bases of the true American system," retorted Albert Gallatin, "of that system, free of restrictions, which, permitting every man to pursue those occupations for which he was best fitted, had in less than two centuries converted the wilderness

[55] Hirst, p. 115.

[56] S. Sherwood, "Tendencies in American Economic Thought," *Johns Hopkins University Studies*, XV, pp. 573 *ff*. See also F. L. Paxson, *History of the American Frontier, 1763-1893* (1924), pp. 246 *ff*.

[57] The reaction against the American system was reflected in the opposition of South Carolina to the Tariff of 1832. The economic doctrines of the South Carolinians were drawn from Adam Smith and were expressed by Thomas Cooper, President of the College of South Carolina. See his *Elements of Political Economy* (1826). The relations of Dr. Cooper with the South Carolina political leaders were close. See D. Malone, *The Public Life of Thomas Cooper* (1926); J. W. Burgess, *The Middle Period* (1897), Chap. x.

into an earthly paradise; and out of a few persecuted emigrants, had created a prosperous, happy, and powerful nation. Under the auspices of that system of freedom, the American people, amidst all the fluctuations and vicissitudes incident to human affairs, had never ceased to make the most rapid progress in agriculture, arts, and commerce. To ascribe that unexampled and uninterrupted prosperity, which even legislative errors cannot arrest, to a tariff is one of the most strange delusions by which intelligent men have ever suffered themselves to be deceived."[58] Gallatin's memorial was little more than a year off the press when Clay, by his tariff compromise with Calhoun, abandoned his own American system.[59]

Scarcely had the tariff controversy passed into the background of American political discussions when the slavery issue loomed on the horizon. The movement for the abolition of slavery took definite form in 1831 when the pacific agitation of Benjamin Lundy gave place to the vehement denunciations of William Lloyd Garrison. The *Liberator* under the editorship of Garrison infused into the controversy a deep religious fervor amid which it was sought to extend the revolutionary definitions of liberty and equality to include all men.[60] Garrison, it is true, had no matured political philosophy and was not interested in the problem of government. The beginning and the end of his endeavors was the immediate emancipation of the Negroes. But emancipation was not to be accomplished within a single day, and many of the radical abolitionists, exasperated by the attitude of the government, sought the guidance of political theory.

[58] Gallatin's *Free Trade Memorial* was drawn up following a meeting of the Free Trade Convention in Philadelphia in September and October 1831. It was presented to Congress in January 1832, and is reprinted in F. W. Taussig, *State Papers and Speeches on the Tariff* (1892). Thomas Hart Benton, who supplanted Clay as the leading statesman of the West, denied that the tariff benefited his constituents. T. Roosevelt, *Thomas Hart Benton* (1886), p. 91.

[59] Calhoun later claimed that the promulgation of the doctrine of nullification defeated Clay's American system. *Correspondence of John C. Calhoun.* Reprinted in the *American Historical Association Report for 1899,* II, p. 422.

[60] See the Declaration of the American Anti-Slavery Convention which assembled at Philadelphia in 1833. *Selections from the Writings and Speeches of William Lloyd Garrison* (1852), pp. 66-70. An account of Garrison's activities is given in W. P. and F. J. Garrison, *Life of Garrison* (1889).

The clearest expression of the political thought of the extreme abolitionists was given by Henry D. Thoreau. Accepting the motto, "That government is best which governs least," he declared: "Government is at best but an expedient; but most governments are usually, and all governments are sometimes, inexpedient." The government of the United States, although excellent in form, "never of itself furthered any enterprise, but by the alacrity with which it got out of its way." The real achievements of the American people Thoreau attributed to their inherent character, and this would have accomplished more "if government had not sometimes got in its way."

Thoreau believed that the reason "a majority are permitted, and for a long period continue, to rule is not because they are most likely to be in the right, nor because this seems fairest to the minority, but because they are physically the strongest. But a government in which the majority rule in all cases cannot be based on justice, even as far as men understand it." The reasoning by which Paley and other followers of Bentham resolved all civil obligation into expediency, Thoreau unsparingly condemned. There are cases, he said, "in which a people, as well as an individual, must do justice, cost what it may." The people of the United States "must cease to hold slaves . . . though it cost them their existence as a people."

The intense individualism which colored Thoreau's thinking led him to subordinate the state to the individuals for whose good it was established. "There will never be a really free and enlightened state," he said, "until the state comes to recognize the individual as a higher and independent power, from which all its own power and authority are derived, and treats him accordingly." The conscience of the individual cannot be resigned to the legislator; "we should be men first, and subjects afterward."[61]

In the search for a criterion of the relations between the individual and the state, William H. Seward declared in the United

[61] *Writings* (1906), IV, pp. 356 *ff.* Ralph Waldo Emerson in his essays on *Self Reliance* and *Politics* gave a somewhat different interpretation of the principle of individualism.

States Senate that there is a higher law than the Constitution.[62] What he meant by this higher law, Seward did not explain, but it is clear that his conception embraced the idea of the supremacy of the law of God.[63] His speech was closely scanned by William Hosmer, who identified the higher law with divine law. "Man's will is not supreme in the department of morals," wrote Hosmer. "He cannot love and hate the same being at the same time; nor can he be good and bad at the same time. He cannot blend vice and virtue, nor change the nature of the one or the other. What is right, is right in spite of him; and what is wrong, is wrong in spite of him. Hence it is clear that in these particulars he is controlled by a law above himself, the conditions of which he is unable to change, and the authority of which he is equally unable to throw off."[64]

It was Hosmer's object to show that civil government was subject to definite limitations imposed by the higher law. Civil government could not bind the conscience, impair natural rights, release man from his responsibility to God, or change the nature of vice and virtue. Conversely the powers of government were to maintain the rights which government was prohibited from transgressing. Obedience to the commands of the legislator must be determined by the rightness of the law. This involved a decision by each individual whether human legislation was in all respects consistent with the law of God.[65]

Through their assertion of these extreme claims in behalf of the principle of individualism, the radical abolitionists aroused a storm of dissent in the South. Whereas southern senators had

[62] *Congressional Globe,* 31st Cong., 1st Sess., XXII, Pt. 1, Appendix, p. 263. Webster ridiculed the idea of a higher law and took his stand firmly upon the Constitution. Schurz, II, p. 387.

[63] Earlier in his speech Seward said: "There is but one law for all, namely, that law which governs all law,—the law of our Creator. . . . We are told that we may rely on the laws of God, which prohibit slave labor in this new territory, and that it is absurd to re-enact the laws of God. The Constitution of the United States and the constitutions of all the States are full of such re-enactments. Wherever I find a law of God or a law of nature disregarded, there I shall vote to re-affirm it with all the sanction of civil authority." See T. K. Lothrop, *William Henry Seward* (1898), pp. 86 *ff.*

[64] *The Higher Law in its Relation to Civil Government* (1852), p. 21.

[65] *ibid.,* pp. 75 *ff.*

previously upon occasions invoked the higher law, they now scrutinized the Bible to show that slavery not only was not sin but also that it was commanded by God through Moses and approved by Christ through the apostles. The abolitionists, it was charged, were seeking "to erect among men a higher standard of morals than the Almighty has revealed, or our Saviour preached; and which is probably destined to do more to impede the extension of God's kingdom on earth than all the infidels who have ever lived."[66]

The extreme pro-slavery argument was penned by the Virginia communist, George Fitzhugh. "Whilst the law is on the statute book," he said in defending slavery, "every citizen is bound to respect and obey it, or else take the consequences of trespass, felony or treason. He may discuss the question, 'Does the law coincide with the higher law?' but he may not act on his conclusions if they be against the law."[67] To Fitzhugh political philosophy was not only useless but also dangerous; it "will blow up any government that is founded on it." He disagreed with the authors of the Declaration of Independence that governments "derive their just powers from the consent of the governed," and argued that all governments must originate in force, and be continued by force.[68] His distrust of the Jeffersonian principle of governmental non-interference was as unequivocal as his dissent from the doctrine of natural rights. Fitzhugh demanded more government and less law. "Let Alone" must be repudiated if we would have any government. People everywhere should act upon the principle that the world is "too little governed." The time had arrived, thought Fitzhugh, when "anarchy, plus the street constable," would no longer suffice.[69]

Neither the radical abolitionists nor the extreme defenders of

[66] See especially the paper of Governor Hammond of South Carolina, *Slavery in the Light of Political Science* (1845). This essay, together with other pro-slavery arguments, will be found in E. N. Elliot, *Cotton is King, and Pro-Slavery Arguments* (1860).

[67] *Sociology for the South* (1854), p. 204.

[68] *Cannibals All!* (1857), pp. 353, 357.

[69] *ibid.*, pp. 359, 361. Fitzhugh attempted to describe the beauties of a slave economy in *Slavery Justified* (1850).

slavery shaped the thought of the majority of the American people upon the slavery issue. In its earlier stages the controversy gave rise to an interesting philosophic discussion of the concept of liberty, but the humanitarian movement for the emancipation of the slaves was not of transcendent importance. The differences between the conflicting parties, although asserted with much bitterness, did not touch principles which were fundamental. "We are slave-holders or abolitionists," wrote Richard Hildreth in 1854, "not because we differ much either in moral character or intellectual capacity, either in sentiment or opinion, but mainly from differences of social and topographical position." In Hildreth's opinion, the abolitionists and the defenders of slavery were so completely alike in fundamental points that if they were to change places there was "nothing whatever in their moral or intellectual constitution which would prevent them from exactly and most conscientiously filling up each other's places."[70] Hildreth's book was barely off the press when Lincoln in his reply to Senator Douglas at Peoria, Illinois, uttered the same opinion.[71] The slavery controversy might have remained an interesting discussion in moral sentiments if the slaveholders had not determined to extend their institutions into the territories.

The slaveholders embarked upon their program of expansion without any fixed principles. By their refusal to hear petitions in the House of Representatives relating to the abolition of slavery or the slave trade, the southerners demonstrated that slavery was a matter of national concern.[72] But the southern doctrine, announced by Calhoun as early as 1847, was that there could be no interference with slavery by either Congress or the territorial legislature, no community except a State being competent to make a decision.[73] Without attempting to reconcile the conflicting views held throughout the South regarding the institution of slavery and its relation to government, Stephen A. Douglas proposed to find

[70] *Despotism in America* (1854), pp. 301-2.
[71] *Works* (1894), I, p. 186.
[72] Burgess, p. 264.
[73] T. C. Smith, *Parties and Slavery* (1906), p. 123.

a solution of the problem of slavery through his theory of popular sovereignty.

Now, the theory which Douglas thought he was expounding was that of "squatter sovereignty," which had long been a fundamental principle of political theory in the West. As early as 1843 a committee of the Wisconsin legislature declared "that it was a doctrine well understood in this country, that all political communities have the right of governing themselves in their own way within their lawful boundaries."[74] The doctrine of "squatter sovereignty" applied only to questions of internal policy, and did not extend to matters which were national in scope. It was therefore compatible with a localism which aimed at the exploitation of natural resources and a nationalism which embraced the general welfare. The West resented bitterly the efforts of Senator Foot of Connecticut in 1830 to prevent its development by restricting the sale of public lands but it applauded Daniel Webster's defense of the Union. In other words, the doctrine of popular sovereignty, as it developed in the West, was at once individualistic and national in its purpose.

Douglas fell into the grievous error of transforming the western notion of popular sovereignty into a dogma which perverted its real meaning. He maintained that the people of a territory might through their local police regulations introduce or exclude slavery as they pleased, "for the reason that slavery cannot exist a day or an hour anywhere, unless it is supported by local police regulations."[75] He overlooked the southern position that slaves were property which might be taken into the territories under the protection of the Constitution and at the same time brushed aside the growing sentiment in the North that slavery must be forced to remain in the regions which it already occupied. Douglas phrased his doctrine of popular sovereignty so that men might

[74] Quoted in Turner, p. 142.

[75] Douglas, "The Dividing Line Between Federal and Local Authority," *Harper's Magazine*, XIX, pp. 519 *ff.* The divergence between the ideas of Douglas and those of the leaders of the South in 1858 may be seen by comparing this article with Jefferson Davis's speech at Boston on October 11, 1858. *Letters, Papers and Speeches of Jefferson Davis* (1923), III, p. 315.

believe there was some middle ground, on which the rights of free labor might be protected and secured, without exasperating those interested in slave labor. His followers "really did think that two conflicting organizations of society, which are incompatible by the nature of things, might be made compatible by legislative enactments."[76] But when the theory was put to a practical test in the Kansas-Nebraska Act, it proved to be a delusion.

The thought of Douglas emphasized the individualism cultivated in the West, which was strong in selfishness. He was sincere in his belief that the problem of the extension of slavery could be solved by leaving it to the decision of each community. "If Kansas wants a slave-State constitution she has a right to it," he said, "if she wants a free-State constitution she has a right to it. It is none of my business which way the slavery clause is decided. I care not whether it is voted up or down."[77] Douglas was unable to see that a policy of non-interference with the extension of slavery would lead to the disruption of the Union. The principle of individualism, pressed beyond limits, is always incompatible with the existence of government.

It was Douglas's great political opponent Abraham Lincoln who exposed the fallacy in the doctrine of popular sovereignty. "I believe there is a genuine popular sovereignty," he declared. "I think a definition of genuine popular sovereignty, in the abstract, would be about this: That each man shall do precisely as he pleases with himself, and with those things which exclusively concern him. Applied to government, this principle would be, that a general government shall do all those things which pertain to it, and all the local governments shall do precisely as they please in respect to those matters which exclusively concern them."[78] According to this definition, the question of the extension of slavery could not be a matter of exclusive concern to a local government. Local self-government of the Douglas type, which sought to deal with

[76] Schurz, *Douglas and Popular Sovereignty* (1860), p. 1.
[77] *Congressional Globe*, 35th Cong., 1st Sess., p. 18.
[78] *Works*, I, pp. 558 *ff*.

a matter of national concern, could have no place within the American political system.

The tendency of individualism in the United States as elsewhere has been to draw men apart. "It is difficult," remarked DeTocqueville, "to draw a man out of his own circle to interest him in the destiny of the state, because he does not clearly understand what influence the destiny of the state can have upon his own lot."[79] But the principle of individualism, as it flowed from the Jeffersonian school, "became identified with a body of doctrine which in each successive decade became more and more irreconcilable with objective conditions."[80] Few developments of the nineteenth century are more striking than the growth of the dogma of State sovereignty side by side with the expansion of territory, the increase in population and the spread of rapid means of communication which made steadily for nationalism. Individualism as a principle of political action became subjected to definite limitations in a state which depended greatly upon government for the growth of its prosperity. For the frontier had benefited tremendously from legislation of the national government. The land titles of the Indians were extinguished after 1820 in exchange for lands beyond the Arkansas and Missouri rivers, and the advance of civilization was at every step facilitated by Congress.[81] The construction of the Cumberland Road was at once an encouragement to the States to embark upon internal improvements and an earnest of further outlays of public funds. Through the exercise of political power the people of the United States found means to promote their private interests.

When the implications in the slavery controversy were fully revealed, it became clear that acquiescence in particularist doctrines, whether of States' rights or of popular sovereignty as phrased by Douglas, would lead to the disruption of the Union. The North and West therefore combined to resist the application

[79] *Democracy in America,* II, p. 111.
[80] W. A. Dunning, *Essays on the Civil War and Reconstruction* (1898), p. 358.
[81] Colegrove, "The Attitude of Congress Toward the Pioneers of the West, 1820-1850," *Iowa Journal of History and Politics,* IX, pp. 196-302.

of doctrines which led to national dissolution. The foundations of this union were laid in the control of government by those economic interests which could command a numerical majority in Congress and the State legislatures. From individualism as a political principle the people of the United States turned to the rule of the numerical majority.

CHAPTER V

THE PRINCIPLE OF MAJORITY RULE

MAJORITY rule is a familiar device in the American political system.[1] Together with universal suffrage, it has appeared to be the essential requisite of democracy. But neither universal suffrage nor majority rule were regarded as fundamental to popular government in 1787. At the time of the adoption of the Constitution, few States extended the franchise beyond the property owners and most States did not hesitate to apportion representation so that power remained lodged with the older tidewater sections after population preponderated in the interior. While the political theory of the formative period of the American governmental system reflected the spirit of democracy and equality, the institutions bore very often the marks of class control.

American political development by the time of Andrew Jackson brought a sharp challenge to the institutions set up in the earlier State constitutions. Frontier individualism proved a powerful factor in democratizing political institutions. Not only did the constitutions in the newer States of the Mississippi valley embrace the principles of universal suffrage and the apportionment of representation upon a basis of population, but changes in the constitutions of the older States were also forced to admit similar provisions.[2] In Virginia the conflict between the tidewater and the interior was unusually acute and reflected most accurately the reaction of frontier ideas upon established political arrangements. It became apparent by 1830 that population would soon preponderate west of the Alleghenies while the bulk of taxable property

[1] J. G. Heinberg, "History of the Majority Principle," *American Political Science Review*, XX, p. 52.

[2] Porter, pp. 48-9.

lay in the eastern valleys. Frontiersmen excited the people of the tidewater sections lest the slaves of the latter be taxed to provide public improvements for the interior. The defenses of the property owner, which lay in the unequal apportionment of representation and the restriction of the franchise to the freeholder, would be completely destroyed if political power were allowed to pass into the hands of the numerical majority.

The issue between the frontier and the older settlements was fought out in the Virginia constitutional convention of 1829-1830. In reply to the arguments of the seaboard property owners in behalf of existing political arrangements, the men of the interior insisted that the reform of the franchise and of representation was the logical culmination of the earlier revolutionary movement. "There can be no grosser error than to suppose that the constitution of Virginia was formed in 1776," declared one member of the convention. "Its two great distinctive features, the sectional and the aristocratic, had been given to it a century before. The equal representation of the counties, which was the remote cause of its sectional character, was established in 1661 by a general assembly representing a population residing exclusively in the tidewater country, and consequently, at that time, homogeneous in character and identical in interest. The limitation of suffrage to freeholders, which gave to it an aristocratic character, was imposed on the colony in 1667, without an act of assembly, by a letter of instructions from the King of England to his governor in Virginia, backed and enforced by two regiments of British soldiers, who had been sent to the colony for the express purpose of suppressing a popular insurrection. At the era of the revolution, then, these two provisions had been the constitutional law of the colony for more than one hundred years. The freeholders had learned to pride themselves on their superior power and privileges, and the smaller counties on their equality with the larger. The body of the people were reconciled by habit to their actual condition."

These two features of the Virginia constitution, established early in the history of the colony, could not be altered at the time of the revolution. "It was utterly impossible, under such circum-

stances, to pull down and erect anew the whole fabric of government. And it would have been to the last degree unwise and impolitic, at such a fearful crisis, to distract the minds of the people by attempting a new distribution and arrangement of political power. It would have been the very height of folly, at such a crisis, to create disaffection in the minds of the freeholders, by stripping them of their exclusive powers, and to exasperate the smaller counties by degrading them from the rank which they had held under the royal government. In leaving the freeholders and the counties as they found them, the framers of the constitution bowed to the supreme will of necessity, and acted like wise and practical statesmen." But political arrangements founded on force could not be justified for long in a democratic state. Indeed, as far back as 1781 Thomas Jefferson had called attention to the inconsistency between the theoretical principles of the Revolutionary constitution-makers and their practical regulations. The time had arrived when the people of Virginia should proceed to "a practical enforcement of those principles of political law which were solemnly announced by the fathers of the Revolution."[3] This, it was argued, could only be accomplished by apportioning representation upon a basis of the free white population exclusively.

The liberal argument of the men from the interior was met by Judge Upshur. "There is a majority in interests," he said, "as well as a majority in numbers." He not only denied "that there is in a majority an *a priori*, inherent and indestructible right to rule a minority" but also asserted that "there are no original prin-

[3] *Debates*, Virginia Convention, 1829-1830, p. 57. See also Jefferson's criticism of the constitution in 1816. *Works* (ed. Ford), XII, pp. 3-15. In the Maine constitutional convention of 1819 conflict arose over the method of apportioning representation. One faction adhered to the scheme of town representation, which was general throughout New England, while the other faction argued for selection from districts apportioned according to population. The plan finally adopted combined the two ideas. Each town having 1,500 inhabitants was entitled to one representative and additional representatives were given for increases in population. *Debates*, Maine Convention, 1819 (ed. Perley), pp. 123 *ff*.

ciples of government at all." In his judgment, "the principles of government are those principles only which the people who form the government choose to adopt and apply to themselves; principles do not precede, but spring out of government." Although the consent of the governed is necessary to render legitimate any form of government, the people are free to choose the principles upon which they shall rest their political institutions. In this process of selection it is obvious that they must consult their interests and circumstances. The establishment of a government upon the principle of the numerical majority can only succeed if there is in fact an identity of interests among the people. "If the interests of the several parts of the commonwealth were identical," continued Upshur, "it would be safe and proper that a majority of persons only should give the rule of political power. But our interests are not identical, and the difference arises from property alone. We therefore contend that property ought to be considered in fixing the basis of representation." In short, "the rights and interests which spring from the possession of money" ought to be taken into account in formulating the majority principle.[4]

Conservatives like Upshur refused to admit that the majority principle as defined by their opponents was derived from the political philosophy of 1776. On the contrary, they said, it was the product of French politics and French irreligion and had its starting point in the fancies of Rousseau.[5] "I want no French liberty," shouted Leigh of Chesterfield, "a liberty which first attacked property, then the lives of its foes, then those of its friends."[6] In tones trembling with human passion the younger conservatives denounced as tainted with the principles of the French Revolution the speeches of the western members, and claimed for their own arguments the support of Milton and Locke and the whole course of English constitutional development.[7]

[4] *Debates,* Virginia Convention, 1829-1830, pp. 65-79. The attitude of John Marshall upon the questions which arose in the convention is admirably set forth in A. J. Beveridge, *Life of John Marshall* (1919), IV, Chap. IX.
[5] *Debates,* Virginia Convention, 1829-1830, p. 137.
[6] *ibid.,* p. 157.
[7] C. H. Ambler, *Sectionalism in Virginia* (1910), pp. 153-4.

While diversity of opinion postponed the settlement of the question of apportionment, the convention proceeded to consider the proposal for an extension of the suffrage. It was generally admitted that permanent common interest with the community and sufficient attachment to its welfare should be demanded of all voters, but there was no agreement as to what should constitute evidence of this condition. A majority of the members of the convention undoubtedly thought the possession of real estate necessary.[8] But it was observed that a citizen in the western part of the State, "at an expense not exceeding the price of the paper on which a deed could be executed, might qualify himself as a voter."[9] The tidewater planters, who feared the growth of population in the interior, were therefore desirous of having the freehold qualification for suffrage expressed not in the quantity of land but in terms of its value. Upon this uncertain and changing standard the exercise of the suffrage could hardly be made to depend. "If you measure a man's right to vote by the value of his landed property," remarked one delegate, "a man may always hold the same tract of land—the same portion of the soil—and yet have or not have the right to vote according to the variations of the price of his land and its produce."[10] Nevertheless, so evenly balanced were the conflicting factions in the convention that both in the matter of apportionment and the extension of the suffrage compromises had to be reached which, because they did not rest upon sound principles, proved impermanent.

Freehold qualifications for suffrage had already succumbed to the rising tide of democracy in Massachusetts and New York. In the Massachusetts convention of 1820 a taxpaying qualification was adopted despite strenuous efforts to restrict the suffrage to landowners. The abolition of all pecuniary qualifications for electors was opposed on the ground that "it introduced a new principle into the constitution; it was universal suffrage."[11]

[8] *Debates,* Virginia Convention, 1829-1830, p. 386.
[9] *ibid.,* p. 347.
[10] *ibid.,* p. 352.
[11] *Debates,* Massachusetts Convention, 1820, p. 247.

Nobody seriously argued for universal suffrage and most men believed that there should be some test whereby the franchise remained in the hands of responsible persons. This test the convention professed to find by applying the requirement that voters should be taxpayers.[12]

The readiness of the Massachusetts convention to extend the suffrage to all taxpayers may be explained by the fact that the upper house of the legislature was regarded as the peculiar guardian of the property right. When, therefore, a resolution was introduced to divide the State into districts from which senators should be chosen upon a basis of population, the property interests were aroused. Isaac Parker thought this undermined the whole system of checks and balances upon which the government was founded. "The representation in our legislature," he said, "was founded upon two principles—in the most numerous branch upon the proportion of population, and in the other on the proportion of taxation."[13]

The distinguished Justice Story thought that "government stands on a combination of interests and circumstances." He denied that the existing constitution was founded on a basis of property but insisted that it stood upon a basis of taxation. Thus no advantage was given to the rich over the poor. Property is not directly represented but stands as a check in fixing the principles of rational liberty. To Story it seemed that the apportionment of senators on a basis of population involved the destruction of the system of a balanced government.[14]

Daniel Webster went directly to the heart of the question whether senators were to be chosen in proportion to the number of inhabitants in each district or in proportion to the part each district bears in the public burdens of the State. Recurring to the ideal of a balanced government, he defined the senate as a check not upon the people but on the house of representatives. In this view Webster was undoubtedly supported by the historical posi-

[12] *ibid.*, p. 257.
[13] *ibid.*, p. 263.
[14] *ibid.*, pp. 283-91.

tion which the upper house had enjoyed in Massachusetts since the seventeenth century. But a checking body of this sort requires some difference, or character, or interest, or feeling, or sentiment; this requirement is best met by a different sort of qualification in the electors for the two houses.

The apportionment of senators according to the public taxes paid by each district appeared to Webster to be the most practicable arrangement. With enthusiasm he cited the dictum of Harrington that power naturally and necessarily follows the balance of property. Republican institutions therefore rest not more on political constitutions than on those laws which regulate the descent and transmission of property. The true principle of a free and popular government would seem to be to found it on men's interests; it would seem to be a part of political wisdom to found government on property. "If the nature of our institutions be to found government on property," concluded Webster, "and that it should look to those who hold property for its protection, it is entirely just that property should have its due weight and consideration in political arrangements."[15]

The following year in the New York constitutional convention the landed proprietors made a stand to control the State senate. Having been defeated in their efforts to restrict the suffrage to freeholders, they hurried to support a resolution of Chief Justice Spencer to keep the senate from the broader electorate. The venerable Chancellor Kent argued that society is an association for the protection of property as well as life, and the individual who contributes only one cent to the common stock ought not to have the same influence and power in directing the property concerns of the partnership as he who contributes his thousands.[16] Although the convention rejected the resolution to limit the election of senators to freeholders, they were not prepared to adopt the principle of universal suffrage. A taxpaying qualification was inserted which lasted only a few years; in 1826, following the advice of Governor DeWitt Clinton, the constitution was amended to extend the

[15] *Debates,* Massachusetts Convention, 1820, pp. 304-12.
[16] *Debates,* New York Convention, 1821, p. 221.

suffrage to all white male citizens above the age of twenty-one years.[17]

In the light of the historical development of second chambers in American legislatures the conservatives in both Massachusetts and New York were undoubtedly correct in their arguments. The United States Senate and the upper houses of the State legislatures were designed as agencies of control upon the representatives of the people. It was therefore entirely appropriate that they should be derived from different sources from those of the lower houses. The fallacy in the conservative argument lay in the assumption that the interests originally represented in the upper houses of the legislatures were unchanging. When agriculture was the only important industry in the United States, freehold qualifications for the suffrage could be indulged without serious contravention of the principle of democracy. But the growth of commerce and manufactures introduced many new groups whose members held property in forms other than land, or in whom was vested the ownership of no property at all. It was the impermanence of social and economic groups which destroyed the historical arguments of the landed proprietors.

The rise, growth and decline of social and economic groups is inevitable because of the rapid and continuous changes which take place in the composition of the groups. Men and women do not remain in the social positions in which they were born nor cling through life to the same economic pursuits. Most advocates of group representation fall into the error of ascribing to economic interests a preeminent position in the social process. That is to say, they are content to invoke as the sole causes of social change the economic needs of man and their satisfactions without consideration of other elements. John Stuart Mill long ago pointed out "how far mere physical and economic power is from being the whole of social power."[18] Although extremists still argue from

[17] C. Z. Lincoln, *The Constitutional History of New York* (1906). I, pp. 640 *ff.*; II, p. 4; J. H. Dougherty, *Constitutional History of the State of New York* (1915), pp. 113-14.

[18] *Representative Government* (Everyman's Library ed.), p. 84.

the standpoint of economic determinism, the growth of democracy in the United States cannot be referred in any great degree to economic influences. Material interests are a part of the great social forces which influence the destiny of man. But all social forces react upon the wills and thoughts of men and become effective in so far as they are embodied in human contrivances. The mind of man is therefore in itself a great force which may modify environmental factors. Among the various political institutions there exists the possibility of a rational choice. But if stability in the government is to be attained, the choice must rest upon those arrangements which are consistent with the permanent not the transitory interests of the people, the spiritual rather than the material purposes of society.

The unequal apportionment of representation and property qualifications for the suffrage lingered in many of the southern States after they had been abolished elsewhere because of the persistence of definitely marked group interests. The southern planter continued to present plausible reasons for recognition in the process of government long after the agricultural interests in other sections of the country had been reduced to an equality with industry and commerce. James Monroe had the interests of the planter in mind when he argued in the Virginia convention that representation should be based upon the white population, with some reasonable protection for property. "But how," he said, "is this to be done? It may be done in two modes. First it may be arranged, as it is in South Carolina, by taking both into consideration; base your representation on the white population of the State, and combine that with the proportion of taxes throughout the whole; then each district will have its own share. The other mode is thus: Let one of the branches of the legislature be placed upon the basis of white population alone, and the other branch on the compound basis of population and taxation. If this plan be adopted, then the question arises, in which branch shall the white basis prevail and in which the compound? Will you give the basis of white population only to the House of Delegates, or to the Senate? I think it will be more safe for both sections, for

the western and Atlantic country, if you give it to the House of Delegates, and for the compound basis to prevail in the Senate.

"If you could agree on this arrangement, the country will, I think, be satisfied, and there will be an ample check upon the course of legislation by the structure of the Senate. The popular branch may then originate whatever it shall think most for the good of the country; and if, through the stimulus of heated feelings, they should propose any improper measures, the Senate will operate as an immediate check."[19] That is to say, Monroe clung to the idea advanced by Madison that the interests of economic groups should be safeguarded by introducing them into the internal construction of the government.

The landowners had already lost much of the advantage gained under the early State constitutions because apportionment had come to be based upon the census figures instead of the number of ratable polls. When the first constitutions were framed there were no census figures available, and the practice had been to estimate the population by counting the taxpayers, who were the only persons readily discernible.[20] With the introduction of the decennial census, population statistics became available, and the practical difficulty of enumerating the people of a State was overcome.

The situation in South Carolina, to which Monroe referred, bore eloquent testimony to the methods by which the plantation interests along the seaboard maintained control of the State government until the interior had become assimilated to their peculiar economic institutions. Government under the constitution of 1790 had scarcely been inaugurated when the upland regions of the State complained that the apportionment of representation was unequal and unjust. The census of 1790 revealed in the three lower districts a white population of 28,644 and in the upland districts 111,534. But the former elected twenty senators and

[19] *Debates*, Virginia Convention, 1829-1830, p. 151.

[20] S. E. Morison, "The Struggle over the Adoption of the Constitution of Massachusetts, 1780," *Massachusetts Historical Society Proceedings*, L, pp. 353-412.

seventy members of the assembly, while the latter were allowed only seventeen senators and fifty-four assemblymen.[21]

The movement for reform in South Carolina at the outset rested upon a theoretical basis. Accepting the notion that society originated in a compact in which each individual agreed to give up certain rights and be bound by the will of the majority, the reformers insisted that the apportionment of representation must be equal and in proportion to population. To the proposition that property ought to be considered in fixing the basis of representation, they contended that society existed long before private property. If property were given direct representation the few must get control of the many and aristocracy become the only possible form of government. That was not to say, however, that representation could not be apportioned on the combined basis of population and property. This could be accomplished by the recognition of property in the apportionment of one house of the legislature.

In reply to the advocates of political reform the conservatives brushed aside the reasoning of their opponents with arguments not unlike those used by Rousseau to deny that force is the basis of the state. Conservative opposition to reform was intensely practical and was based largely upon existing conditions in South Carolina. It appeared to men like Timothy Ford and Henry William Desaussure that the tidewater planters had acquired rights in the State and its government through prior settlement. As prior occupants of the soil they could not be called upon to make a concession which would place their property and their interests under the control of the numerical majority in the interior. They were entirely willing to recognize the rights of the upland settlers to life and property and to afford them protection. They were content to bear the greater burden of taxation, as they had done from the beginning. But the very existence of the people of the lowland country depended upon the perpetuation of certain fundamental

[21] W. A. Schaper, "Sectionalism and Representation in South Carolina," *Annual Report of the American Historical Association for 1900,* I, p. 408.

institutions, and the power of abrogating or altering these could not be submitted to any people on earth.[22]

The fears of the tidewater that the preponderance of the interior in the legislature would jeopardize the institution of slavery are hardly justified by the facts. Although few men in the upland region owned slaves, there was no disposition on the part of this section to interfere with slavery in the State. Equality with the reformers was a principle not intended to be pushed to its logical conclusion. Indeed, it was not long before they gave up contending for purely abstract rights. What the interior wanted was greater representation in the legislature and not the abolition of slavery. If reapportionment could be obtained by quieting the groundless fears of the lowland slave owners, the reformers were agreeable to compromise.

The reformers soon ceased to contend for an apportionment wholly upon a basis of population. Recognizing the peculiar circumstances in the State, they urged that the representation be so changed that the interior should have more influence in the government while the tidewater retained the desired protection for its wealth. Attention was called to the three great divisions of the State which were unlike in almost every respect. A solution of the vexing problem was suggested through the distribution of power so that the middle country would hold the balance. By this arrangement the concurrence of the conflicting interests would be required to enact legislation affecting them.

In abandoning their claims in behalf of abstract rights the reformers were left without any basis for further agitation. They could not allege that under the existing government the interior was being oppressed, and men refused to become excited over the possibility of oppression in the future. It was not until 1808 that the demand for a system based upon some principle that would remove representation from dependence upon an arbitrary decree of the legislature resulted in reform. In the meantime the tidewater retained its supremacy in the legislature on the ground that it had peculiar interests which it must have the power to protect.

[22] *ibid.*, p. 416.

This amounted to saying that, in order to prevent an abuse of legislative power by the majority, the power to do so was to be entrusted to the minority.[23]

The reform of 1808 provided for a redistribution of the representation on the basis of population and taxation; the legislature was to allow one representative for every sixty-second part of the whole number of white inhabitants in the State, and one representative also for every sixty-second part of the taxes raised by the legislature of the State. But the cheerful acquiescence in this measure by the tidewater districts was due entirely to the fact that the interior had "assimilated so nearly to the privileged districts below."[24] The institution of slavery had extended along the river valleys with the development of cotton raising so that an identity of interests was created between the low country and the interior. The tidewater was winning over the majority to its interests and institutions. When the interests of the low country became also the interests of the interior, the former had no desire to engross the legislative power; "their greed for power was not so much for office and spoils as it was for security."[25]

The importance of this development in South Carolina can hardly be overestimated. The discussions over the question of apportionment not only fixed the bases of the principles for which southern statesmen in a later day were to contend but also marked the decline of the contract theory of government in the United States. Thomas Cooper, in his lectures to the students of the State college in South Carolina, wrote an indictment of the doctrine of natural rights which profoundly influenced the political thought of his time. Cooper rejected completely the ideas of natural law advanced by Grotius, Pufendorf and Vattel. In his opinion, "the universal law of nature is force." Society defines the rights which individuals may enjoy; that which society refuses to acknowledge and protect cannot be claimed as a right. It was therefore impossible for Cooper to conceive of any set of inalienable rights sanc-

[23] Schaper, p. 432.
[24] *ibid.*, p. 433. See also J. G. VanDeusen, *Economic Basis of Disunion in South Carolina* (1928), Chap. I.
[25] *ibid.*, p. 432.

tioned by natural law which existed independently of all government.[26] While Cooper's ideas were finding fertile soil in the minds of southern statesmen his political philosophy became eclipsed by that of John C. Calhoun.

Calhoun developed his political philosophy in the course of a constitutional inquiry into the nature of the Union. He was, in fact, primarily concerned with demonstrating the constitutional premises of the doctrine of States' rights. But his thought went beyond the domain of constitutional law and embraced the more fundamental problems of the nature of the state and the origin of government. Calhoun's *Disquisition on Government* and the papers which comprise the *Federalist* are the only first-rate contributions made by the United States to the literature of political theory.

Government, according to Calhoun, is made necessary by the nature of man. In no age or country has man been found in any state other than the social, because his inclinations and wants impel him to associate with his fellow-beings. But despite the gregarious nature of man, "his direct or individual affections are stronger than his sympathetic or social feelings."[27] The propensity of human nature to prefer individual to social interests leads inevitably to conflicts in society which, if not controlled, become destructive of the social state and the ends for which it was ordained. The power by which the individual passions and desires are controlled in behalf of social welfare is government.

Although government is intended to protect and preserve society, it has a strong tendency to disorder and the abuse of its powers. The perversion of governmental power is due to the fact that it must be administered by men who are themselves infected with the evil government is intended to guard against. Those who are entrusted with the exercise of power are also animated by individual feelings which are stronger than their social affections. It is only by the formation of an adequate constitution that the

[26] *Lectures on the Elements of Political Economy* (1826).
[27] J. C. Calhoun, *Works* (1874), I, p. 3.

powers of government can be safeguarded and the tendency to oppression be counteracted.

While government is necessary to man, and is of divine origin, the form or constitution is of human contrivance. Man is left to perfect what divine wisdom ordained as necessary to preserve the race.

How can those who are invested with the powers of government be prevented from employing them as the means of aggrandizing themselves instead of using them to protect and preserve society? In answer to this question Calhoun proposes to explain on what principles government must be formed, in order to resist, by its own interior structure, the tendency to abuse of power. These principles involve a correct adjustment of the right of suffrage and the creation of an organism "by which resistance may be systematically and peaceably made on the part of the ruled to oppression and abuse of power on the part of the rulers."[28]

Calhoun admits that if every portion of the community had the same interests, "the right of suffrage, of itself, would be all-sufficient to counteract the tendency of the government to oppression and abuse of its powers."[29] But such is not the case. "On the contrary, nothing is more difficult than to equalize the action of the government, in reference to the various and diversified interests of the community; and nothing is more easy than to pervert its powers into instruments to aggrandize and enrich one or more interests by oppressing and impoverishing the others."[30] The right of suffrage alone cannot counteract this unfortunate tendency of government. Indeed, "the more extensive and populous the country, the more diversified the condition and pursuits of its population, and the richer, more luxurious and dissimilar the people, the more difficult is it to equalize the action of the government, and the more easy for one portion of the community to pervert its powers to oppress and plunder the other."[31] Since the right of suffrage places the control of the government in the com-

[28] Calhoun, I, p. 12.
[29] *ibid.*, p. 14.
[30] *ibid.*, p. 15.
[31] *ibid.*, p. 16.

munity, the same constitution of human nature which brings about conflicts between individuals will stimulate strife between the great interests in society. It is therefore necessary to add to the right of suffrage some organism which will prevent a dominant majority from using the powers of government to aggrandize itself at the expense of the others. In other words, the constitution must establish "some restriction or limitation, which shall so effectually prevent any one interest, or combination of interests, from obtaining the exclusive control of the government, as to render hopeless all attempts directed to that end."[32]

Calhoun sought through his theory of the concurrent majority to create the organism which should check the tendency in government toward oppression. The concurrent majority requires "taking the sense of each interest or portion of the community, which may be unequally and injuriously affected by the action of the government, separately, through its own majority, or in some other way by which its voice may be fairly expressed; and to require the consent of each interest, either to put or to keep the government in action." There is further required "such an organism of the government,—and, if necessary for the purpose, of the community also,—as will, by dividing and distributing the powers of government, give to each division or interest, through its appropriate organ, either a concurrent voice in making and executing the laws, or a veto on their execution."[33]

The concurrent majority was designed as a necessary complement to the right of suffrage. The object of the latter is to collect the sense of the community, but the most it can do is to collect the sense of the stronger interests, or combination of interests, and to assume this to be the sense of the community. The fatal defect of the numerical majority is that it confounds the sense of the greater number of the whole as that of the community. Thus all the rights, powers and immunities of the whole people come to be attributed to the numerical majority. But the concurrent majority regards interests as well as numbers; it considers the community

[32] *ibid.*, p. 24.

[33] *ibid.*, p. 25.

as made up of different and conflicting interests, as far as the action of the government is concerned, and takes the sense of each through its majority or appropriate organ, and the united sense of all as the sense of the entire community.[34]

Calhoun defined constitutional government as one which takes "the sense of the community by its parts, each through its appropriate organ, and regards the sense of all its parts as the sense of the whole. They all rest on the right of suffrage, and the responsibility of rulers, directly or indirectly." In contrast to constitutional governments Calhoun opposes the various forms of absolute government which "concentrate power in one uncontrolled and irresponsible individual or body, whose will is regarded as the sense of the community." Absolutism may flourish in a democracy, if dependence be placed upon the numerical majority. Hence "the great and broad distinction between governments is,—not that of the one, the few, or the many,—but of the constitutional and the absolute."[35]

In the opinion of Calhoun, the Constitution of the United States originally established a government of the concurrent majority. The numerical majority of the population had no agency whatever in the process of framing and adopting the Constitution. Likewise in the amending process a numerical minority can alter the Constitution against a decided numerical majority. With enthusiasm Calhoun demonstrated that the government of the United States is composed of two elements, the States in their corporate character and their representative population. It was the object of the men of 1787 in organizing the government, especially in contriving the legislature, to give to the two elements of which it is composed separate but concurrent action. Congress was intended to be the embodiment of the idea of the concurrent majority.[36]

[34] Calhoun, I. p. 28.

[35] *ibid.*, pp. 36-7.

[36] *ibid.*, pp. 168 *ff.* "With my views of the Constitution," Calhoun once wrote, "I could do no act that could countenance a usage, as they call it, intended to supersede in practice the fundamental compromise of the Constitution. To destroy or supersede that would be to revolutionize the government." *Correspondence*, p. 565.

But the government of the United States, with all its complication and refinement of organization, is but a part of a system of governments. Each State has its own separate government, which is its exclusive and representative organ as to all powers which have not been delegated to the government of the United States. To the people of the several States sovereignty devolved upon the separation from Great Britain, and it was through the exercise of this sovereignty that the State constitutions as well as the Constitution of the United States were created. In other words, the Constitution of the United States was ordained and established by the people of the several States, acting as so many sovereign political communities, and not by the people of the United States, acting as one people, though within the States.[37]

Sovereignty, according to Calhoun, is indivisible; in the United States it is located in the people of the several States. It is the powers of government which are distributed between the States and the United States. Each, within its appropriate sphere, possesses all the attributes and performs all the functions of government. Neither is perfect without the other, but the two combined form one entire and perfect government.

It is absurd to suppose that the citizens of the different States have, by ratifying the Constitution, divested themselves of their individuality and sovereignty and merged themselves into one great community or nation. They have, in fact, granted in the nature of a trust certain powers to be exercised by the government of the United States. "There is no difficulty," Calhoun remarked, "in understanding how powers appertaining to sovereignty may be divided; and *the exercise* of one portion delegated to one set of agents, and another portion to another." But sovereignty itself cannot be divided; "it must, therefore, and of course, remain unsurrendered and unimpaired in the people of the several States."[38]

Since Calhoun viewed the Constitution as a compact between sovereign political communities, he insisted that the individual

[37] Corwin, *Doctrine of Judicial Review*, Chap. II. For the controversy on this point in the Federal Convention, see Farrand, I, p. 461.
[38] Calhoun, *Works*, I, pp. 146-7.

States enjoy a veto on the proceedings of the government of the United States.[39] "Nothing short of a negative, absolute or in effect, on the part of the government of a State," he remarked, "can possibly protect it against the encroachments of the government of the United States, whenever their powers come in conflict."[40] The exercise of this negative is possible because sovereignty, "in its plenitude, unexhausted and unimpaired," resides in the people of the several States.[41] It therefore follows that a State may reject any measure enacted by the government of the United States which it regards as inconsistent with the terms of the Constitution. This nullification extends to the exercise of the proposed measure within the borders of the State. If three-fourths of the States support the action of the United States government, the nullifying "State is not bound to acquiesce. It may choose whether it will, or whether it will not secede from the Union." The right of secession "results, necessarily, from the nature of a compact between sovereign parties."[42]

Whatever may have been the merit of Calhoun's inquiry into the historical foundations of the American system of government, his doctrine of secession involved a fatal confusion of ideas. He sought nothing less than the establishment of the power of revolution as a constitutional right.[43] It is unnecessary to remark that the people of a democratic state never divest themselves of the power to change forms and resume powers granted to governmental agencies. The exercise of this popular power may be conditioned upon a clause of the constitution, in which case it is a legal right. But when a government becomes so oppressive that it defeats its legitimate ends, then the people from whose consent

[39] Calhoun, I, p. 181.

[40] *ibid.*, p. 241.

[41] *ibid.*, p. 274. "Nullification is the extreme remedy of the Constitution," declared Calhoun, "and ought never to be resorted to until all others have been fairly tried and failed." *Correspondence,* p. 491.

[42] *ibid.*, pp. 300-1.

[43] Robert E. Lee wrote in 1861: "Secession is nothing but revolution. . . . It is idle to talk of secession. Anarchy would have been established, and not a government, by Washington, Hamilton, Jefferson, Madison, and other patriots of the Revolution." Quoted in Corwin, *Doctrine of Judicial Review,* p. 101 n.

it derives its just powers are morally justified in overthrowing by force the perverted government and establishing another in its place. This has been called the right of revolution, but it cannot be called a constitutional or legal right. An act cannot at once be constitutional and revolutionary; the two terms are mutually exclusive.

Calhoun moreover failed to see that the powers of government when delegated became plenary. The government of the United States through the Constitution came into the possession of certain enumerated powers which it was bound to exercise as long as the clauses delegating them remained a part of the fundamental law. The agreement by which the delegation was effected had become an executed contract. "When the people agree to erect a government," Webster said in reply to Calhoun, "and actually erect it, the thing is done, and the agreement is at an end. The compact is executed, and the end designed by it is attained."[44] That the delegated powers were held in the nature of a trust in reality strengthened the position of the government. They could not be recalled except by the amendment of the Constitution, according to the method prescribed in Article V, or by an act of revolution.

The Constitution of the United States provides the means of its own alteration. Upon the same principle that conditional ratification of the instrument was denied, the idea of a reservation to withdraw was abandoned.[45] The work of the people of the United States, considered as one political society although operating for convenience through the several States, the Constitution

[44] D. Webster, *Works* (1851), III, p. 468. For a summary of Webster's argument, see Merriam, pp. 284 *ff.*

[45] Madison wrote Hamilton in 1788: "My opinion is, that a reservation of the right to withdraw, if amendments be not decided on, under the form of the Constitution, within a certain time, is a *conditional* ratification; that it does not make New York a member of the new Union, and consequently that she could not be received on that plan. The Constitution requires an adoption *in toto* and *forever*. It has been so adopted by the other States. An adoption for a limited time would be as defective as an adoption of some of the articles only. In short, any condition whatever must vitiate the ratification. The idea of reserving the right to withdraw was started at Richmond, and considered a conditional ratification, which was itself abandoned as worse than a rejection." Hamilton, *Works* (1851), I, p. 465.

may be amended and the people resume their powers in a lawful manner.[46] By its own terms the Constitution established a union which was perpetual; secession could therefore never be legal. The only tenable view was that the Constitution established not a compact between States but a fundamental law to which each State became subordinate. The government of the United States contemplates no limitation as to its duration.[47]

Calhoun's work was a powerful attempt to formulate democracy in terms of minority rule. His theory of the concurrent majority influenced profoundly the thinking of many southern statesmen and found practical embodiment in the constitution of the Confederacy.[48] But his proposal that equilibrium between the North and South should be restored and preserved was vain and impracticable. Northern Democrats were quick to see that the maintenance of a balance of power between sections unequal in population was visionary. It would be a moral and physical impossibility, remarked Stephen A. Douglas, to establish for all

[46] See the opinion of Marshall, C. J., in McCulloch *v.* Maryland, 4 *Wheaton* 316 (1819). The resolutions of the majority in Congress on the nullification controversy in 1832 averred: "The people of these United States are for the purposes enumerated in their Constitution, one people and a single nation." To say, retorted Calhoun in behalf of South Carolina, "that the people of these United States . . . are now or ever have been . . . formed into one nation or people is not only without foundation in truth, but contrary to the most certain and plain historical facts, and the clearest deductions of reason." Such conclusions, he contended, must lead to "a consolidated government without constitutional check or limitation," and "must necessarily terminate in the loss of liberty itself." J. W. Moore, *History of Congress* (1895), pp. 283-4.

[47] Lincoln in his first Inaugural Address said: "I hold that, in contemplation of universal law and of the Constitution, the union of these States is perpetual. Perpetuity is implied, if not expressed, in the fundamental law of all national governments. It is safe to assert that no government proper had a provision in its organic law for its own termination. Continue to execute all the express provisions of our national Constitution and the Union will endure forever, it being impossible to destroy it, except by some action not provided for in the instrument itself." *Works* (1894), II, p. 3.

[48] See especially A. P. Upshur, *Brief Inquiry into the True Nature and Character of Our Federal Government* (1840); P. C. Centz, *The Republic of Republics, or American Federal Liberty* (1865); A. Stephens, *A Constitutional View of the Late War Between the States* (1868); J. Davis, *The Rise and Fall of the Confederate Government* (1881). The constitution of the Confederate States will be found in Davis, I, pp. 684 *ff.*

time to come an equal number of free and slave States. Even that faithful Democrat, William A. Richardson, the chief lieutenant of Douglas, rejected the idea of a parity between the free and slave States. "Be assured," he warned his colleagues in the House of Representatives, "that thirteen millions of people will never consent that they shall have no more political influence and power than seven millions."[49]

To the people of the North and West Calhoun's alternatives, the maintenance of an equilibrium of power between free and slave States or peaceful secession, were equally unthinkable. Indeed, when Henry Clay in 1850 offered his famous compromise measure in Congress, only the most radical members from the southern States entertained the notion of disunion.[50] Senator Shields of Illinois told the southern statesmen that they must abandon "all idea of an equilibrium. Here it never existed, and never can exist. It is a fanciful notion at best—the mere dream of a political visionary." With equal vigor he denounced the doctrine of secession. "The peaceful separation of the States—an amicable destruction of this government?" he cried. "No, sir; the very attempt would be war. . . . Does any sane man suppose that the great Northwest, with its millions—that world that is growing up between the headwaters of the Ohio and the headwaters of the Missouri, between the Allegheny and the Rocky Mountains—will ever peaceably submit to see the mouth of the Mississippi river in the possession of a foreign government? Never, sir, never. . . . The idea is . . . very little short of insanity."[51] If the West was individualistic and democratic

[49] *Congressional Globe,* 31st Cong. 1st Sess., XXII, Pt. 1, Appendix, pp. 423-5. The debates on the Compromise of 1850 are summarized in A. J. Beveridge, *Abraham Lincoln* (1928), II, Chap. 11.

[50] See the colloquy between Calhoun and Senator Foote of Mississippi in *Congressional Globe,* 31st Cong., 1st Sess., XXI, Pt. I, pp. 461-4. The antagonism between those southern members of Congress who were anxious for adjustment, and those who insisted upon immediate secession unless every demand of the South was granted, grew so heated that personal fights were often narrowly averted, and sometimes did take place. See the citations from contemporary newspapers in the footnotes of Beveridge, II, pp. 91 *ff.*

[51] *Congressional Globe,* 31st Cong., 1st Sess., XXI, Pt. I, p. 649.

in sentiment it was also sincerely attached to the principle of nationalism. To the people of this section the unity of the nation was essential. "Disunion," said one of the western members in Congress, "is ruin to them. They have no alternative but to resist it whenever and wherever attempted. . . . Massachusetts and South Carolina might, for aught I know, find a dividing line that would be mutually satisfactory to them; but, sir, they can find no such line to which the western country can assent."[52]

But the choice between alternatives was rejected in the North no less than in the West. "What is proposed," remarked William H. Seward in the United States Senate, "is a political equilibrium. Every political equilibrium requires a physical equilibrium to rest upon, and is valueless without it. To constitute a physical equilibrium between the slave States and the free States requires first an equality of territory, or some near approximation; and this is already lost. But it requires much more than this; it requires an equality, or a proximate equality, in the number of slaves and freemen. And this must be perpetual."[53] The idea of a balance of power between the North and South was the vestige of a political environment which had already passed away. The rise of the West had overturned the balance which, according to Calhoun, had been established in 1787. A strong national sentiment was growing up in the United States which viewed the doctrine of State sovereignty with abhorrence.[54] Under its influence particularism could find no place in the American political system. Our government, concluded Seward, "is a democracy of property and persons, with a fair approximation toward universal education, and operating by means of universal suffrage."[55]

Seward was an opportunist whose chief purpose was to advance his own selfish interests. But he was none the less able to define accurately the changes which were taking place in the United

[52] Quoted in Turner, p. 142.
[53] *Congressional Globe,* 31st Cong., 1st Sess., XXII, Pt. I, Appendix, p. 263.
[54] R. G. Gettell, *History of American Political Thought* (1928), p. 304.
[55] *Congressional Globe,* 31st Cong., 1st Sess., XXII, Pt. I, Appendix, p. 267.

States. The advance of democracy was being facilitated in every State by the extension of the franchise. The property qualification for suffrage, which had existed in a majority of the States in 1787, had by 1820 given place to taxpaying qualifications. With the exception of Tennessee, no State outside the original thirteen ever introduced the property test. The taxpaying qualifications in turn began to be discarded. They were never adopted in the new constitutions framed in the West, and where they were retained in the older States the taxes were so low that little opposition was excited. Gradually the tax requirement was dropped and universal manhood suffrage was introduced.[56]

The last stand of the property test for voting was made in Rhode Island and occasioned a popular insurrection. The government of the State was under the old charter granted by Charles II in 1663, which provided a property qualification in real estate for voting. Repeated attempts to introduce a taxpaying qualification by way of an alternative failed. But the growth of industrial cities in the State introduced large urban populations whose members could not meet the property qualification. To their demands for a broadening of the franchise the freeholders in the southern portions of the State made strenuous opposition. "Claiming the right of the freeholder to rule," declared the historian of the controversy, "and pretending that no other man could safely be trusted with a participation in the affairs of government, they have had the folly to resist all attempts at change, with the apparent conviction that they would be able to stem the torrent of opposition, and to carry out the old system through all time. Holding in their hands the balance of political power, and being still farther strengthened by great numbers in the north, they steadily refused all concessions, till the period arrived when it was found that concession was necessary to the safety of the State."[57]

[56] Porter, pp. 105 *ff*. Pennsylvania and Rhode Island still maintain a taxpaying qualification for voting. The poll tax must not be confused with the taxpaying qualification for the franchise. A poll tax is not a test of this sort, although some States may accomplish this end by requiring that one pay poll tax before voting.

[57] J. Frieze, *A Concise History of Suffrage in Rhode Island* (1842), pp. 50-1.

But the advance of universal suffrage, which was taking place everywhere throughout the United States, could not be withstood in Rhode Island by an argument of this sort. The widespread movement for change was in effect a great political revolution to which the disfranchised in Rhode Island were not indifferent.

The movement for a more liberal franchise in Rhode Island crystallized in 1840 with the appearance of a pamphlet entitled *An Address to the Citizens of Rhode Island Who Are Denied the Right of Suffrage*. This pamphlet urged the people of each town to hold primary meetings, call a State convention, elect delegates and append to the credentials of each member a list of the voters. The convention was to canvass the votes and if it appeared that the whole number cast was greater than at the last general election for members of Congress, then the convention was to consider itself the representative of a majority of the people and fully authorized to frame a constitution. Under this constitution members of Congress were to be elected who should go to Washington and claim seats in the House of Representatives, which would then be forced to decide whether the charter of Charles II, or the constitution framed by the people, embodied that republican form of government which is guaranteed to every State by the Constitution of the United States.[58]

Upon this popular revolution the disfranchised citizens of Rhode Island proceeded to embark. Mass meetings were held and a convention was called to meet in October 1841, to frame a new constitution. The "People's Constitution" was drawn up and submitted to the people for ratification or rejection at the end of December. When the votes were all in, it was found that nearly fourteen thousand ballots had been cast in favor of the constitution. The suffrage provisions of this constitution were much more liberal than the reformers had originally intended. Their aim had been the establishment of a taxpaying qualification, but the constitution extended the franchise to every white male citizen of

[58] J. B. McMaster, *History of the People of the United States* (1910), VII, p. 167.

the United States after a residence of one year in the State and six months in the town.

Meanwhile the legislature had sought to forestall the popular movement by calling a convention which had legal status. This convention met in November 1841, and adjourned to meet again in February 1842. When it reassembled the vote on the "People's Constitution" had indicated the extent of the desire for a more liberal suffrage. A constitution was thereupon drafted by the legitimate convention which became known as the "Landholder's Constitution." This document bore the marks of political nativism. Every white native male citizen of the United States who was of full age and had resided for two years in the State, and six months in the town, was to enjoy the franchise. If, however, he owned, in the town where he resided, real estate to the value of one hundred and thirty-four dollars the residence requirement was reduced to one year. Foreign-born citizens must have resided in the State three years after naturalization and satisfy the property requirement in order to vote.[59]

The "Landholder's Constitution" was a liberal document and ought to have caused the end of the revolution. In the apportionment of representation it adopted the basis of population, which was more enlightened than the provisions of the "People's Constitution" which assigned to each town a fixed number of representatives. The suffrage provisions of the two constitutions were not sufficiently dissimilar as to give cause for dissatisfaction. But the leaders of the popular movement were angry; they resented the interference of the legislature and, as a result of their agitation, the "Landholder's Constitution" was rejected at the polls on March 1, 1842.

The leader of the popular party, Thomas W. Dorr, then declared the "People's Constitution" in force and proceeded to set up a government under it. The resulting conflict between Dorr and the legitimate government under the old charter is known as the Dorr War.[60] Failing to break the resistance of the legitimate

[59] *ibid.*, p. 170.

[60] Frieze, pp. 81 *ff.* An account of the Dorr War will be found in A. M. Mowry, *The Dorr War* (1901).

government, defections began to appear in the ranks of the popular party and Dorr was obliged to seek safety in flight. He subsequently returned to Rhode Island and was convicted and sentenced to imprisonment for life, a fate from which he was freed by the legislature upon which he had made war.

Another constitutional convention was called which displayed the utmost anxiety to comply with the desires of the popular party. The Dorr War had given eloquent testimony to the defeat of limited suffrage in Rhode Island. By the terms of the constitution which became effective in 1843, native male citizens of the United States who had paid a tax of not less than one dollar or had done military service could vote after a residence within the State of two years. If a man owned real estate valued at one hundred and thirty-four dollars, or property yielding an annual rental of seven dollars, the residence requirement was reduced to one year. Foreign-born citizens continued to be subject to the property test and there was no discrimination against Negroes.[61] Although these provisions are slightly less liberal than those of the "Landholder's Constitution" which was rejected, they mark the end of property tests.[62]

Under the pressure of economic necessity the movement towards universal suffrage embraced aliens as well as citizens. The new States in the region of the Great Lakes were eager to secure settlers and it was thought that foreigners might be induced to take up residence there if they were offered the elective franchise very soon after their arrival. The Wisconsin constitution of 1848 was the first to extend the suffrage to aliens. It provided that aliens might vote after they had declared their intention to become citizens of the United States.[63] The same generous provision for

[61] Porter, p. 101.

[62] Property tests lingered in New Jersey until 1844, in Virginia until 1850, and in North Carolina until 1856. They were quietly dropped in each State without opposition.

[63] Art. III, Sec. 1. In the convention which met in Iowa in 1844 it was moved "that all foreigners who have resided in the State for three years, and who have declared their intentions to become citizens of the United States, shall be permitted to vote for representatives and county officers." The proponent of the

foreigners was urged in the Indiana convention of 1850, but the clause finally agreed upon permitted aliens to vote one year after making declaration of intention to become citizens.[64]

In the Illinois convention of 1847 a proposal was made to extend the suffrage to aliens who had declared their intention to become citizens of the United States. The debate on the subject was protracted, since opposition based upon political nativism developed. The riotous conduct of the Irish at the polls in the eastern cities had begun to attract attention and many people distrusted a provision that might promote such disorders. Nativism finally triumphed and the suffrage clause was adopted restricting the vote to white male citizens.[65] A somewhat similar debate occurred in the Michigan convention of 1850, where it was proposed to extend the franchise to aliens. The State had already spent large sums of money to induce immigrants to settle upon the unoccupied lands. It was argued that since Wisconsin and Indiana permitted foreigners to vote, Michigan must do likewise or suffer loss in the competition for settlers. But the argument did not prevail, and the constitution as finally adopted confined the suffrage to white male citizens who had resided for six months within the State.[66]

If the tendency in the States of the Northwest was towards a more generous extension of the franchise, there were a few indications of reaction in the olders States of the East. The establishment of literacy tests in Connecticut and Massachusetts was necessitated by the election disturbances in the towns where

measure said he did not intend the provision to extend any further than voting for State representatives and county officers. The ensuing debate disclosed great confusion in the minds of the delegates. Some thought such a provision contrary to the laws of the United States while others thought it was the privilege of the State to admit such persons as it chose to the suffrage. The proposed measure was defeated in the convention. *Fragments of the Debates of the Iowa Constitutional Conventions of 1844 and 1846* (ed. Shambaugh), pp. 44-7.

[64] Art. II, Sec. 2.

[65] Art. VI, Sec. 1. The debate will be found in A. C. Cole (editor), "The Constitutional Debates of 1847," *Collections of the Illinois State Historical Library*, XIV, pp. 524-608.

[66] Art. VII, Sec. 1. See also *Debates*, Michigan Convention, 1850, p. 47.

illiterate Irishmen predominated. These men, although naturalized citizens, were too ignorant to understand the political institutions of the country and were easily manipulated by unscrupulous politicians.[67] But there were also demands for the restoration of the property qualification for voting. The Pennsylvania convention of 1837 debated the abandonment of the taxpaying qualification in favor of a property test.[68] In the New York convention of 1846, the rural districts expressed a desire for a property test for voting.[69] Jealousy of the growing urban centers prompted the country districts to demand that voting be limited to the freeholders. In the country areas almost every voter was also a landowner, and the farmers saw in the restoration of the property tests the only means of maintaining their hold upon the State governments against the influence of the preponderating populations in the cities.

The arguments in behalf of a return to property tests were unavailing. The extension of the franchise once begun led eventually to universal suffrage. "When a nation modifies the elective qualification," remarked DeTocqueville, "it may easily be foreseen that sooner or later that qualification will be entirely abolished. There is no more invariable rule in the history of society: the further electoral rights are extended, the more is felt the need of extending them; for after each concession the strength of the democracy increases, and its demands increase with its strength. The ambition of those who are below the appointed rate is irritated in exact proportion to the great number of those who are above it. The exception at last becomes the rule, concession follows concession, and no stop can be made short of universal suffrage."[70] The wisdom of DeTocqueville was fully vindicated by the developments which were in his own day taking place in the United States. The movement towards universal suffrage paused briefly to rest the franchise upon a taxpaying qualification.

[67] See G. H. Haynes, "A Know Nothing Legislature," *American Historical Association Report for 1896*, II, pp. 177-87.
[68] *Debates*, Pennsylvania Convention, 1837, p. 121.
[69] *Debates*, New York Convention, 1846, pp. 383, 402, 477.
[70] DeTocqueville, I, p. 38.

This was but a half-way station on the route to the ultimate abandonment of all restrictions upon the franchise.[71]

The adoption of universal manhood suffrage throughout the United States assured the triumph of the principle of majority rule. In a few State constitutional conventions proposals were made to apportion representation upon some basis other than that of the number of inhabitants, but these were unsuccessful. The Iowa convention of 1844 in the interest of economy sought to limit the size of the legislature. But arguments in favor of small legislative bodies were met by the declaration that "the people were in favor of having a full representation. It was necessary in order to represent the small districts fairly without producing inequalities."[72] In the Illinois convention of 1847 the idea was advanced that there should be "a county representation, so that the large counties could not overshadow the smaller."[73] One member thought that "each county in itself possesses a kind of minor sovereignty; that sovereignty should be represented."[74] Another member insisted that "every county had an interest of its own to be represented, and he thought that if we once denied that interest a representation in the popular branch of the legislature, you might as well abolish the house altogether."[75] No debate is more important than that which occurred in the Kentucky convention of 1849. The rapid growth of population in Kentucky was confined to Louisville and the manufacturing towns in the Ohio river valley. Under the constitution of 1790, which provided that representation should "be equal and uniform" and "forever regulated and ascertained by the number of qualified electors therein," the agricultural interior feared the preponderance of population in the northern counties. Their demand was for a

[71] For a contemporary account of the success of universal suffrage by a foreigner who had travelled extensively in the United States, see C. Lyell, *Travels in America* (1845), I, pp. 227 *ff*.

[72] *Fragments of the Debates of the Iowa Constitutional Conventions of 1844 and 1846*, p. 134.

[73] *The Constitutional Debates of 1847*, p. 128.

[74] *ibid.*, p. 132.

[75] *ibid.*, p. 148.

reapportionment of representation which would secure their supposed interests against possible combinations of the more populous districts.[76]

The failure of particularist arguments in the State conventions was not less significant than in the Congress of the United States. The growth of the country had brought about an identity of interests between its various parts which was reconcilable with the principle of majority rule. In the Kentucky convention of 1849 those who clamored most vigorously for special legislation in behalf of the agricultural interests admitted the benefits which accrued to the farmers from the development of manufactures. "I rejoice in the growth of the city of Louisville, and in her prosperity," exclaimed the chief spokesman for the agrarian districts. "Our great agricultural region is immediately connected with her. She is the market into which we throw our wealth; and the growth of every year. I wish her therefore to continue to grow and prosper, but I do not wish her to attain a position . . . to control and govern the commonwealth."[77] Most men, however, perceived that where there was no great diversity of interests there was little danger in lodging political power in the hands of the numerical majority.

Similarly there had grown up an identity of interests between the West and the Atlantic seaboard. Industry combined with agriculture to produce that equality of interests which Calhoun admitted would enable the right of suffrage alone to counteract the tendency of the government to oppression and abuse of its powers. The South alone stood outside the influence of those economic forces which were welding the West and the older States of the North together. With their slave economy the planters of the South were separated from the farmers of the West and the manufacturers of the North by an unbridgeable gulf. The realities of the situation were fully grasped by Calhoun. One of the fine dreams of the hour was a railway line from Cincinnati to Charleston, making the South Carolina city a rival of Philadelphia and

[76] *Debates*, Kentucky Convention, 1849, pp. 457 *ff*.
[77] *ibid.*, p. 463.

New York.[78] Calhoun believed the success of a connection with the West was of the utmost importance politically and commercially to the South, but it could not be accomplished.[79] Even the project of Stephen A. Douglas to join the Great Lakes with the Gulf of Mexico came too late. The eastern cities had been joined with the Mississippi valley before the Illinois Central Railroad could be built.

Southern statesmen were unable to identify the interests of their constituents with the growth of the country. The slave owners stood revealed as an oligarchy which threatened the economic progress of the South and the development of popular government.[80] The institution of slavery was the great sinister interest which thwarted the formation of a genuine public opinion throughout the United States. The leaders of the South had failed before the tragedy of the Civil War. For the latent spirit of nationalism could not endure the existence of interests adverse to those of the whole community.

The growth of public opinion founded upon the sense of the majority was reflected in the constitutional arguments of Daniel Webster.[81] It made its appearance in political theory when Francis Lieber defined the sovereignty of the state. Sovereignty, according to Lieber, is the vital principle of the state. It rests not upon a contract made by the people but springs from the organic unity of a homogeneous population united by a common tradition and inhabiting a common territory. Sovereignty manifests itself in a

[78] Beard, *Rise of American Civilization* (1927), I, p. 658.

[79] *Correspondence,* pp. 411-12. See also VanDeusen, Chap. VI.

[80] H. R. Helper, *The Impending Crisis of the South* (1857). Helper was a non-slave owner of the South who believed that slavery was economically bad for his section. He demonstrated the vast superiority of the wealth and resources of the North and insisted that slavery must be abolished before the South could participate in the national prosperity. His work was widely used as a campaign document in the North, where it was regarded as a protest of the city-dwellers and small farmers of the South against the slaveholding oligarchy. For a contrast between the North and South, see McMaster, VII, pp. 267 *ff.*

[81] *Works,* III, pp. 320-41. See also J. Story, *Commentaries on the Constitution of the United States* (1833).

public opinion which finds expression through law and possesses supreme power. "Public opinion," said Lieber, "is the continued sovereign action of society."[82] Lieber's writings left a deep impress upon political thought in the United States, but the clearest expression of the majority principle was stated by Frederick Grimke, who resigned from the Supreme Court of Ohio in 1842 to devote himself to political studies.

"If, in laying the foundations of government," remarked Grimke, "our design is to consult the common interests of the whole population, there is no alternative but the rule of the majority. If when the vote is taken, either among the citizens at large, or in the legislative body which represents them, the will of the greater number did not prevail, the minority would be at liberty to act without rule, not merely as regards themselves, but in regard to the majority also. . . ."[83]

Upon grounds of political expediency there can be no principle, except that of majority rule. "The rule of the majority . . . is the only principle . . . calculated to secure the happiness and prosperity of the whole. The various opinions and views which are current in society evidently do not exist for the purpose of being carried literally into practice. Their great use is this, that they rouse inquiry, sharpen discussion, lead to extended and thorough examination; and thus, by eliciting the truth, . . . produce the greatest attainable advantage to the whole community. Men's opinions and feelings may be the most diverse imaginable, but their interests cannot be so. The giving free scope to the first, and then subjecting them to the will of the majority, is the only way to give consistency to the last and of reducing to a system the complicated concerns of society."[84]

A diversity of opinions does not argue a diversity of interests; nor is it impossible through public policy to reconcile a divergence

[82] *Manual of Political Ethics* (1838-1839), I, pp. 216 *ff.* For a brief summary of Lieber's political writings, see L. R. Harley, *Francis Lieber* (1899), pp. 120 *ff.*

[83] *Considerations on the Nature and Tendency of Free Institutions* (1848), p. 62.

[84] *ibid.*, p. 63.

of interests. "It may be laid down as a proposition admitting of few exceptions," said Grimke, "that whenever a majority is competent to take care of its own interests, it will also be competent to take care of those of the minority. This results from two circumstances: first, that all the prominent and substantial interests of the lesser will be included in those of the larger body; and, secondly, that parties in a republic—the only form of government in which the terms majority and minority are legitimate expressions—do not occupy the fixed position which they have in monarchy and aristocracy. . . . In a country where free institutions exist, all the great interests of the minority will be inclosed in those of the majority."[85]

Nevertheless, the latent possibilities of tyranny in the unrestricted rule of the majority cannot be argued away. Calhoun was right when he insisted that human ingenuity must contrive safeguards for the minority. But the evils of majority rule can never be cured by turning the control of the government over to the minority. The correct answer was given by Lincoln when he said: "A majority held in restraint by constitutional checks and limitations, and always changing easily with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people. Whoever rejects it does, of necessity, fly to anarchy or to despotism. Unanimity is impossible; the rule of a minority, as a permanent arrangement, is wholly inadmissible; so that, rejecting the majority principle, anarchy or despotism in some form is all that is left."[86] The principle of majority rule is therefore a device which, although it contains no inherent ethical validity, affords a practical means whereby groups of people may reach decisions. Whatever dangers lurk in the use of the principle must be curbed by constitutional construction.

[85] *ibid.*, p. 64.

[86] *Works*, II, p. 5.

CHAPTER VI

SOME RECENT TENDENCIES

THERE is no distinctively American political theory. American thinkers have occasionally attempted to formulate more or less complete theories of the state, and American statesmen have not disdained the guidance of theory in the development of public policy. But there exists no "system of principles touching the nature, functions and end of the state which is distinguished from all others by revealing in its elements the dominating influence of American characteristics and institutions."[1] American statesmanship has been essentially practical, resorting to political theory usually in order to justify accomplished facts or to find a solution of complicated problems by providing some underlying general principles. The aid of political theory was most frequently sought in the beginning of our institutional development. It has been suggested that the dearth of political thinking in this country, since the formative period of its political institutions, is the accident of special economic conditions rather than exhaustion.[2] Whether this be true or not, it must be admitted that the American people have not been lacking in ingenuity whenever the necessity arose to put political theory to constructive use.

Political theory comprises remarkably few ideas which recur in infinite combinations. If the ideas themselves bear the marks of great antiquity, they are often adapted to new arrangements which take place imperceptibly through the pressure of social and economic changes. The foundations of the political order in this country have long been unchanged, largely because the energies of the people have been expended in the exploitation of the rich

[1] Dunning, *Essays on the Civil War and Reconstruction* (1898), p. 365.
[2] Laski, *Foundations of Sovereignty* (1921), Preface.

resources of the continent. As long as the promise of American life assures to the individual more abundant riches, it is difficult to see why the development of political theory on this side of the Atlantic should be more fruitful. For it is undoubtedly true that political ideas mature under the stress of deep-rooted controversies. Someone has said in paraphrase of Carlyle that it is a happy country that has no political theory, for the growth of political theory indicates that a revolution has just occurred or is about to occur. If "in the years immediately following the Civil War there was an almost complete atrophy of political theory" in the United States, it was because the issues which challenged the minds of men were well settled by the victory of the North.[3]

Perhaps the most significant development in political thought has been in relation to the doctrine of sovereignty. As the central concept of political theory, sovereignty is of perennial interest. Defined by Bodin in the sixteenth century in the effort to escape from the intolerable confusion of the French wars of religion, sovereignty became identified with a low view of human nature. Whatever Bodin may have thought about human nature, his successor Thomas Hobbes was convinced of the utter depravity of man. It seems probable that the theory of sovereignty was suggested to Hobbes by analogy with the theological doctrine of original sin. The theologians recognized the good as well as the evil in man's nature, but they believed that if left to himself man always succumbed to the evil. It required the grace of our Lord and Saviour, Jesus Christ, to enable man to realize the good that is latent in his spiritual nature. Similarly, Hobbes was convinced that the natural state of man is war, but that man is impelled by a precept of reason to seek escape from this condition. However, man could not by his own efforts overcome the barriers which confined him within the state of nature. He must combine with others to relinquish the rights held in a state of nature to a

[3] Wright, *Source Book of American Political Theory* (1929), pp. 545 *ff.* For survey of political ideas in the United States since the Civil War, see Merriam, *American Political Ideas* (1920) and Merriam and Barnes, *Political Theories. Recent Times* (1924).

sovereign, who should "use the strength and means of them all, as he shall think expedient, for their peace and common defense."[4]

The thought of Hobbes was at once a contradiction and a confirmation to subsequent political speculation. The author of *Leviathan* had scarcely found the hole through which to creep out of the world, which he sought in his old age, when Locke and his followers were asserting the omnipotence of education to shape human society and proclaiming the infinite perfectibility of mankind. If the ascent of man has not been as rapid as the eighteenth century philosophers anticipated, there have been at least measurable gains.

But the spread of democracy and the growth of the constitutional system created objective conditions which called for a restatement of the Hobbesian doctrine of sovereignty. The political struggles of the seventeenth and eighteenth centuries resulted in the transfer of more and more power into the hands of the people. In the beginning of our national existence, American thinkers were content to refer sovereignty to the people. The men of 1787 did not regard the people, comprising the whole body of citizens, as a thoroughly amorphous body which has no legal or political signficance. They were, in effect, following Locke who denied that sovereignty can exist anywhere except in the community as a whole. This is the original and supreme will which organizes the government and defines its just powers. While Locke's aim was to subject power to legal limitations, he was unable to make clear how the law-making power can itself be subject to law. He conceived the relationship between the people and their government to be in the nature of a trust, any breach of which gave rise to the right of revolution. In this way Locke defined the limitations of the legislature by the natural rights of the subject.[5]

The framers of the United States Constitution vastly improved upon the theory of Locke by regarding their instrument as a fundamental law in subordination to which the law-making body

[4] *Leviathan,* Chap. XVII.

[5] *Second Treatise of Civil Government,* Chap. XI. See also my introduction to Locke's work in the Everyman's Library.

must act. Thus they were able to mark out as constitutional limitations the natural rights which Locke had been unable to define. Furthermore, through the power of judicial control they set up an intermediate defense between the legislature and the reserve power of revolution in the hands of the people. But this display of constructive genius left the problem of sovereignty unchanged; supreme power continued to be generously ascribed to the people. Indeed, the Convention of 1787, by its failure to distinguish whether the Constitution emanated from the people of the United States or the thirteen peoples of the separate States, left a more fruitful source of controversy than it inherited from Locke and the philosophers of natural rights.

Hobbes had defined sovereignty clearly enough as the highest authority in the state, but he was able to give it *de jure* character only by reference to the social contract. That unhistorical document reduced to one will, by a plurality of voices, the wills of its members. At the same time it effected a conveyance of the right of government to the sovereign thus created. But the introduction of the idea of a will dependent upon other wills contradicted the essence of the state as defined by Hobbes. It opened the way for the confusion of sovereignty as the highest legal authority in the state with the actual power of the people.[6]

The precise nature of sovereignty was obscured in the early controversies in the United States over the nature of the Union. The authors of the *Federalist* confused sovereignty with the powers of government and asserted a theory of divided sovereignty that subsequently proved troublesome. The courts of the United States "gave expression to the same theory that sovereignty is capable of division and actually had been divided under the American system."[7] But a theory which confused sovereignty with the powers of government conflicted with the notion of popular sovereignty which had become a traditional part of American political

[6] W. W. Willoughby, *The Fundamental Concepts of Public Law* (1924), p. 111 n.

[7] Merriam, *American Political Theories,* p. 258. The leading cases are cited in footnotes.

thought. Webster in 1833 exclaimed: "The sovereignty of government is an idea belonging to the other side of the Atlantic. No such thing is known in North America. . . . With us, all power is with the people."[8] He could agree with his great opponent Calhoun that sovereignty is indivisible, but both insisted upon defining sovereignty as the supreme power lodged in the hands of the people. It is superfluous to add that the basic notion of popular sovereignty in the United States, as formulated in the thought of the two men, was widely divergent; Calhoun located sovereignty in the people of the several States while Webster found it in the whole people of the United States. This marked divergence was left for the Civil War to settle.

The conflict between the States not only resulted in the destruction of the particularist doctrines of Calhoun but also compelled the abandonment of purely legal and constitutional proofs that the United States is a nation. The strength of the sentiment for the Union, which was disclosed during the war, led to the belief that the United States was in fact a nation the existence of which had been decreed by definite political and social forces.[9] "Back of all the States, and of all forms of government for either the States or the Union," declared one writer, "we are to conceive of the nation, a political body, one and indivisible."[10] A new nationalism, which looked beyond the Constitution to the political, social and economic forces within the state, had developed.

Influenced by German transcendentalism, Elisha Mulford declared that the nation is a moral organism, not a human contrivance. "The nation exists," he said, "only as men are lifted out of a mechanical existence; in it there is the assertion of their determination, and their free endeavor."[11] The substance of the nation

[8] *Works*, III, p. 469.

[9] J. C. Hurd, *The Theory of Our National Existence* (1881); J. A. Jameson, *Constitutional Conventions* (1866), Sec. 63; E. Mulford, *The Nation* (1870), Chap. IX; O. A. Brownson, *The American Republic* (1865), Chap. VII.

[10] Jameson, Sec. 51. The United States Supreme Court declared: "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas v. White*, 7 Wall. 700.

[11] Mulford, p. 4.

is found in a continuous relationship in reference to which the arbitrary action of the individual is precluded.[12] It is in the will of the organic people that sovereignty is vested. This conception of sovereignty must be distinguished from that which ascribes supreme power to the collective mass in a certain locality. "There is no conception of sovereignty, and none of the state, attaching to this mass," Mulford insisted. "The numerical accumulation of men by no multiplication could attain to the sovereignty of the organic people."[13]

Mulford believed that the nation precedes and enacts the constitution as the determinate form of its political life. This constitution has a two-fold character in which a real and a formal constitution appear. The one is an organism, which is the development of the nation in history, and the other is the method which the nation establishes for its procedure, and the order to which the whole is to conform. But the formal must correspond to the real constitution; the people must find in the constitution the expression of its spirit, and must be able to act in and through it with entire freedom in the furtherance of its aim.[14]

If the Hegelianism of Mulford appears strangely at variance with the course of political thought in the United States prior to the Civil War, the general theory of his book indicates that new doctrines were arising through which an explanation of the growth of American nationality was sought. The contract theory, which had so long dominated American thinking, was relegated to the background. With it went the vestiges of natural rights which had played such an important part in the eighteenth century. Political thinking was taking on a new vocabulary and new forms of speculation. It would be a mistake, however, to credit the men who wrote so conspicuously at the close of the Civil War with any permanent contribution to political thought in the United States. The German influence which began with Lieber and continued through the writings of John W. Burgess undoubtedly

[12] *ibid.*, p. 5.
[13] *ibid.*, p. 135.
[14] *ibid.*, pp. 144 *ff.*

led to a more systematic and scientific discussion of the state.[15] It may even have hastened the demise of the individualistic theories of natural rights which were already passing away. But nationality as formulated by the German philosophers, and interpreted by their American disciples, did not fit the political facts. The unification of the United States, which was accomplished through the surrender at Appomattox, found a more adequate explanation through the writings of men who were not dependent upon foreign sources for their inspiration.

The men who wrote under the influence of the German idealists naturally emphasized the unity and indivisibility of sovereignty. Their work was therefore helpful to the lawyers who soon began to contribute to the post-war development of political theory. It was the object of the lawyers to present a logical explanation of the legal supremacy of the United States. The pursuit of this object led them to the construction of a juristic theory of sovereignty.

The lawyers who contemplated the nature of the state following the Civil War began their inquiries by a scrutiny of the definition of sovereignty which Austin had received through Bentham from Hobbes. This well-known definition designates as sovereign that determinate human superior, not in a habit of obedience to a like superior, who receives habitual obedience from the bulk of a given society.[16] Through a misapprehension of Austin's meaning, Philemon Bliss writing in 1885 was unable to locate sovereignty in a federal state.[17] His analysis of the Austinian conception of sovereignty led him to think that sovereignty suggests not only absolutism but also personal supremacy. In so far as he canvassed Austin's own statement of the location of sovereignty in the United States, Bliss was undoubtedly justified in believing it defective. It was another matter, however, to demand the elimination of the concept of sovereignty from all states, because it was incapable of limitation. Austin had devoted several pages of

[15] Brief statements of these theories may be found in Merriam, *American Political Theories,* pp. 292 *ff.*

[16] J. Austin, *Lectures on Jurisprudence* (1885), I, pp. 220-1. See also W. J. Brown, *The Austinian Theory of Law* (1906), Chap. III.

[17] *Of Sovereignty* (1885), pp. 173-5.

his *Lectures on Jurisprudence* to an analysis of sovereign power.[18] He had remarked that "in almost every independent political society, there are principles or maxims expressly adopted or tacitly accepted by the sovereign, and which the sovereign habitually observes."[19] Similarly, any organ of the government, "like the sovereign body of which it is a member, is obliged or restrained morally; by opinions and sentiments current in the given community."[20]

Bliss came at least within measurable distance of the distinction between sovereignty as the highest legal authority in the state and the actual power in the hands of the people. He saw clearly enough that the power of the state must be manifested through organs, but he was unable to ascribe sovereignty to the ultimate lawgiving agency in the community. Distracted by theories which located sovereignty either in the people or in the nation as an organism, Bliss sought apparent safety through complete denial of the concept.[21]

The difficulties in which Bliss became entangled were surmounted by Woodrow Wilson, who insisted immediately that sovereignty is not identical with the powers of the community. "It is not," he said, "the general vitality of the organism, but the specific originative power of certain organs."[22] Correctly apprehending the meaning of Austin, Wilson pointed out that "the obedience of the subject has always limited the power of the sovereign."[23] With obedience established as the correlative of sovereignty, it follows that "sovereignty is the highest political power in the state, lodged in active organs, for the purpose of governing." This power must be carefully distinguished from the control lodged in the hands of the people. "Sovereign power is a positive thing," declared Wilson, "control a negative thing. Power

[18] *Lectures on Jurisprudence,* I, pp. 263 *ff.*
[19] *ibid.,* p. 266.
[20] *ibid.,* p. 271.
[21] See the various theories presented in brief paragraphs throughout the book of Bliss.
[22] *An Old Master and Other Political Essays* (1893), p. 80.
[23] *ibid.,* p. 81.

belongs to government, is lodged in organs of initiative; control belongs to the community, is lodged with the voters. To call these two things by the same name is simply to impoverish language by making one word serve for a variety of meanings."[24]

The acuteness which Wilson displayed in his definition of sovereignty failed him when he undertook to point out in the government of the United States the exact organs in which sovereignty is lodged. It would perhaps have been wiser if he had concluded his study without embarking upon this task. He was too much impressed with the importance of the States in the Union for his remarks to gain acceptance even at the time he wrote. The growth of federal centralization since that time has carried political thought still further from the position which he then assumed. For it was Wilson's belief that the members of the Union were genuine states, although their "sphere is limited by the presiding and sovereign powers of a state superordinated to them. . . . They have dominion; but it has sovereignty."[25] Certainly the decisions of the United States Supreme Court expanding national power left little to the dominion of the States.

The further quest for a juristic theory of sovereignty applicable to the situation of the United States was undertaken by Professor W. W. Willoughby. Sovereignty, according to Willoughby, is exercised through definite organs of the government. "By whomsoever, or whatsoever body, the will of the state is expressed, and the law created, there we have sovereignty exercised."[26] This may be the legislature, but insofar as the executive possesses ordinance power, he may exercise sovereignty. Constitutional conventions are also embraced within the organs which exercise sovereign power, and the courts as organs for the creation of law are entitled to similar position. "The search for the determinate sovereign governmental organ of a state is an inquiry that has to be separately performed for each state," but the answer will be

[24] *An Old Master and Other Political Essays*, p. 91.
[25] *ibid.*, p. 94.
[26] *The Fundamental Concepts of Public Law*, p. 119.

found whenever all the organs that express the will of the state have been located.[27]

But Willoughby attempts to draw a distinction between the possession of sovereignty and its exercise. He distinguishes the state as the political person or entity, which possesses the law-making right, from the government, which is the agency through which the will of the state is formulated, expressed and executed. "The government thus acts as the machinery of the state, and those who operate this machinery—the magistracy—act as the agents of the state. They exercise, but do not possess, sovereignty; and the extent of their several legal powers is determined by the will of the state as expressed in its laws."[28]

The distinction between the possession of sovereignty and its exercise becomes of fundamental importance to the problem of sovereignty in the United States. Willoughby correctly defines sovereignty as inhering in the United States as a single national state, and not in the individual States of the Union. But the tests whereby he seeks to determine the location of this sovereignty lead him no further than the organs of the government of the United States.[29] In other words, the state ceases to be important in Willoughby's theory of sovereignty when it has established a government.

It is obvious that the acceptance of Willoughby's general theory of sovereignty requires the jettison of the dogma of the Declaration of Independence that governments derive their just powers from the consent of the governed. This proposition Willoughby argues is purely ethical. "If it be advanced as a constitutional principle," he remarked, "the term 'governed' becomes synonymous with the people or citizen body of the state, and it then becomes necessary to ask if this aggregate of individuals is to be viewed

[27] *ibid.*, pp. 118 *ff.* "There are instances in which the electorate acts as a legislative organ. This happens whenever there exists a constitutional provision of practice according to which law may be created by a referendum or other plebiscitary method. When so called upon for its vote, the electorate is to be considered *ad hoc* a legislative body." *ibid.*, p. 119.

[28] *ibid.*, p. 49.

[29] *ibid.*, p. 249.

distributively, or collectively as a corporate unit. If in the former sense, all valid legal or political authority is at once rendered impossible and the state destroyed. . . . If the latter view is taken, and the governed regarded as a corporate unit, it is necessary to determine who are to be regarded as the constituent members of this composite body, and the modes in which it can make its legal will authentically manifest."[30] But no government was ever conceived to require the assent of every citizen or subject, regardless of age or condition. The most that has been asserted was that the consent should be given by certain classes of individuals who are to participate directly in the operation of the government, or indirectly as an electorate for the purpose of choosing representatives who shall act for them. It is apparent if the consent of the governed may be had by consulting any portion of the people, less than the whole, there is no logical limit to the process of comminution. Furthermore, the electorate can act legally only according to predetermined forms, in conventions or assemblies, or by registering their will at prescribed times and in modes already fixed by law.[31]

Nor is it helpful to attempt a distinction between "legal" and "political" sovereignty, whereby the highest political power of the state as exercised through its legally established organs is differentiated from the power of the people exercised by public opinion. "It is undoubtedly correct to make this distinction," Willoughby agreed, "but it seems unfortunate that the same term, 'sovereignty,' should be applied to two forces so radically different, even though distinguishing adjectives be prefixed. Is it not better to term such extra-legal force simply 'public opinion' or 'general will' and to limit the word 'sovereignty' to its purely legal application."[32]

The scanty attention given the state in the juristic theory of sovereignty, as Willoughby moulded it, has been remedied by Professor John Dickinson. Sovereignty, according to Dickinson,

[30] *The Fundamental Concepts of Public Law*, p. 106.
[31] *ibid.*, pp. 107-8.
[32] *ibid.*, p. 112.

"is simply the key-element in a pattern of possible organization to which actual practice may or may not conform, but which remains the only type of organization capable of sustaining what we mean by a régime of law."[33] If there is to be uniformity in the rules of law applied throughout a community, "there must be somewhere within the community not merely an organ or system of organs with supreme power to choose between competing rules of law and to place its stamp of validation upon the one which is to be authoritative, but also a like agency for delimiting the boundaries between the competing jurisdictions of all inferior officials and tribunals. . . . The entire governmental mechanism, if it is to perform its functions, must, in other words, be headed up into a central system of ultimate authority vested with the power to keep subordinate agencies from trespassing on one another's fields—and since this delimitation of jurisdiction is the same thing as a determination of legal rules to govern the exercise of authority by different subordinate agents, the system of ultimate authority for the delimitation of jurisdiction must be identical with that which exists for the purpose of lawmaking."[34] The term sovereign is therefore reserved to designate the supreme coordinating organization within the community.

It is the pronouncements of the sovereign alone that have the quality of law. "The people have a way, to be sure, of making their wishes important to the legislative organ," Dickinson remarked, "but whether or not that organ will attach importance to them, rests within its own choice; and if it does not choose, the will of the people remains unfulfilled in the law."[35] But it is precisely because of this power in the hands of the people to voice their wishes that the state becomes important in the juristic theory of sovereignty. "The sovereign makes laws," declared Dickinson, "but makes them out of existing materials,—ideas, interests,

[33] "A Working Theory of Sovereignty," *Political Science Quarterly*, XLII, pp. 524-48; XLIII, pp. 32-63. Citation at p. 32.
[34] *ibid.*, p. 527. [35] *ibid.*, pp. 531-2.

demands."[36] The effectiveness of the sovereign is therefore inevitably measured by the vitality of the state. In other words, a state having a high degree of legal organization is essential to the existence of sovereignty in the juristic sense.

The state as a social institution has had a long historical development. Even the most primitive social group presents conflicts between interests which must be readjusted. Some form of social control has therefore been necessary from the beginning of human society. The agencies of social control which first arose Professor Dickinson finds were custom and the voluntary adjustment of interests.[37] Neither of these agencies furnishes a complete apparatus for the furtherance of social order. Moreover, it is essential as group life becomes more complex that there shall be some "responsible source to which the group may look for definitive initiation of any program of readjustment, *i.e.*, for initiative which they can follow in the assurance that it will be followed by the other members likewise."[38] It is not enough that the agencies of social control shall function only to prevent or adjust direct conflicts of interests between individuals.

An authoritative organ for the adjustment of differences which shall be external to the parties "represents a method of social control essentially different from, and yet complementary to, adjustment by custom on the one hand, and by voluntary act of the parties on the other."[39] There must be no uncertainty about the pronouncements of this authoritative organ of community leadership. It must act, in the words of Locke, through standing laws and known authorized judges. Thus "law as a body of known public rules of decision throws across individual interests the barrier and the protection of legal rights and duties, and supplies a standard which gives confidence in the impartiality of the adjudicating organ."[40]

[36] "A Working Theory of Sovereignty," p. 46.
[37] "Social Order and Political Authority," *American Political Science Review*, XXIII, pp. 293-328, 593-632.
[38] *ibid.*, p. 595.
[39] *ibid.*, p. 603.
[40] *ibid.*, pp. 605-6.

Political authority can function only in an atmosphere where obedience is rendered willingly to the pronouncements of the organ of control, or to the agencies and persons whom it employs. In the creation of this atmosphere law plays relatively a small part. From the earliest times the existence of non-legal forces which political authority must take into account have been recognized.[41] Hence the vital group processes inherent in the social institution known as the state are fundamental to the establishment and maintenance of political authority. The existence of sovereignty as indicative of the supreme lawmaking organ cannot be assumed without presupposing the state with its legal organization.

The juristic theory of sovereignty by restricting the term law to the authoritative pronouncements of the law-declaring organs of government conflicts with a theory long held in the United States. The essence of this competing theory is summed up in the statement that law is custom. The theory that law is popular custom came to America along with the English common law and was reinforced by passages in Blackstone.[42] It was fully developed in the writings of James Wilson, who thought that the promulgation of law by custom founded it in common consent.[43] The identification of custom with common consent made possible the acceptance of a theory of popular sovereignty without the necessity of unduly exalting the lawmaking bodies. In other words, "by suppressing the conscious volitional element in law," the customary theory of law "supplied a basis for hostility to legislation and entered an appeal from the temporary law-making will of the people to their supposed 'real' or fundamental will as embodied in traditional institutions and vested rights."[44]

The customary theory of law had its most complete development in the United States in the writings of James Coolidge Carter. In the course of an unusually busy life at the bar, Mr. Carter

[41] See the account of early political organization in Munroe Smith, *The Development of European Law* (1928), Book I.
[42] *Commentaries* (Chase ed.), I, Introd., 74.
[43] *Works*, I, pp. 57, 89.
[44] Dickinson, "The Law Behind Law," *Columbia Law Review*, XXIX, p. 127.

found time to oppose successfully the adoption by the State of New York of the Civil Code of which David Dudley Field was the author. He was therefore well equipped to enter the field of juristic controversy. As he surveyed the history of private law, Carter was impressed by the exceedingly small influence of legislation.[45] He was therefore led to believe that the law is found and not made. The decision of a case involves a search in which judge as well as advocates join to discover the rule of law which is to apply.[46] The unwritten law is found to be not a command, or a body of commands, but consists of rules springing from the social standard of justice, or from the habits and customs from which that standard has itself been derived.[47]

The first step in the transformation of custom into formal law is the creation of judges, for without a judiciary formal law could not exist. But though formal law does not at first exist, Carter believes the law itself exists, or there would be no occasion to appoint a judge to administer it. "The social standard of justice," he said, "exists in the habits, customs and thoughts of the people, and all that is needed in order to apply it to the simple affairs of such a period is the selection of a person for a judge who best comprehends those habits, customs and thoughts." While human nature continues unchanged, law will remain custom.[48]

The unanimity with which the early American jurists rejected the notion that law is necessarily the command of a superior was doubtless in the mind of Carter as it was in that of his distinguished contemporary, Professor William G. Hammond. To Hammond it was plain "that we have no sovereign in the juristic or in the political sense."[49] That is not to say, however, that he regarded the origin of law in custom. On the contrary, "we find that the

[45] *Law: Its Origin, Growth and Function* (1907), p. 118.
[46] "The Ideal and the Actual in the Law," *American Law Review*, XXIV, pp. 752 *ff.*
[47] *ibid.*, p. 759.
[48] *ibid.*, pp. 759-61; *Law: Its Origin, Growth and Function*, p. 120.
[49] See Hammond's notes to his edition of Blackstone's *Commentaries* (1890), I, p. 140. Hammond gives extended quotations from the early American jurists.

first trace of any recognition of order and law in the world appears in the form of some god or superior being."[50] There is a higher law than that framed by men. In the initial stages of society, "the resemblance between customary jural law and the law of nature or physical law is complete. Both are systems independent of human will to be observed and followed if one would prosper. One must plow and sow in a certain method if one would reap a satisfactory harvest; one must govern his actions by the customary law if he would not bring pestilence or disaster upon his family or his tribe. . . ."[51] The differentiation between physical and jural law is a later development which becomes complete with the rise of legislation.

Hammond regarded legal rules as having a natural existence comparable to that of the principles of physical science. The function of the judge is to record his observations of the principles of jural law which exist in the order of nature. "Unless we are willing to surrender entirely the belief that there is a divine order in the moral as well as physical constitution of this world," he said, "we cannot assume that all the principles upon which cases of the first impression have been decided for centuries were the creation of the judges who wrote or uttered the particular opinions. Nor can we say that our English and American judges have made the law which they expounded, unless we are willing to admit that the whole course of their jurisprudence for at least six centuries has been an unjust government of litigants by rules that did not exist when they entered into the transactions adjudged. The new view, that they were really making law while they professed only to expound it, seems to me to rest entirely upon the assumption that all law must necessarily be legislation—a rule or rules promulgated beforehand in writing, by some earthly sovereign whom the people are bound to obey. The old doctrine rested on the assumption that there were fixed principles of jural as well as moral right, which every man was bound to obey, and which every magistrate was bound to recognize and enforce to

[50] *ibid.*, p. 96.

[51] *ibid.*, p. 103.

the best of his knowledge and ability."[52] Thus the higher law, to which the rules laid down by the judges must conform, comprises those immutable principles which control the universe. These include the eternal dictates of natural justice, reason, or equity, which are operative in guiding human conduct, no less than the so-called laws of natural science.

The extent to which the belief in a law superior to the will of human governors entered into the formation of the American constitutional system has in our own day been admirably demonstrated by Professor Edward S. Corwin.[53] While it is customary today to ascribe the legality as well as the supremacy of the Constitution exclusively to the fact that it was ordained and established by the people of the United States, another view prevailed in 1787. To the men who were then assembled at Philadelphia there was a higher law which it was their task to translate into terms of personal and private rights. "There are," so runs the theory, "certain principles of right and justice which are entitled to prevail of their own instrinsic excellence, altogether regardless of the attitude of those who wield the physical resources of the community. Such principles were made by no human hands; indeed, if they did not antedate deity itself, they still so express its nature as to bind and control it. They are external to all Will as such and interpenetrate all Reason as such. They are eternal and immutable. In relation to such principles, human laws are, when entitled to obedience save as to matters indifferent, merely a record or transcript, and their enactment an act not of will or power but one of discovery and declaration."[54]

Those who held the conception of law as a discovery could claim kinship through ideas with philosophers and jurists of every age. But it is unnecessary to look beyond the seventeenth century; the conflict in England over royal power as exercised by the Stuart

[52] See Hammond's notes to his edition of F. Lieber's *Hermeneutics* (1880), p. 327.

[53] "The 'Higher Law' Background of American Constitutional Law," *Harvard Law Review,* XLII, pp. 150-85, 365-409.

[54] *ibid.,* p. 152.

kings released those forces which were to project the notion of higher law across the Atlantic into eighteenth century American political thought. The central figure in the development of the notion of law restraining the power of the king was Sir Edward Coke who, as chief justice of the Court of Common Pleas in 1610, decided the famous *Dr. Bonham's Case.* In deciding that the London College of Physicians was not entitled, under the act of Parliament which it invoked in justification, to punish Bonham for practising medicine without its license, Coke said: "And it appears, in our books, that in many cases, the common law will controul acts of parliament, and sometimes adjudge them to be utterly void: for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such act to be void." Coke's "common right and reason" is nothing less than that fundamental or higher law which found ratification in American constitutional law and theory.[55] It was available not only to curb the royal prerogative but also to fix constitutional limits to the power of Parliament. Moreover, Coke came to regard these limitations as being embodied in Magna Charta. In later years as a member of the House of Commons he remarked that "Magna Charta is such a fellow, that he will have no 'Sovereign.'" In short, "the vague concept of 'common right and justice' is replaced with a 'law fundamental' of definite content and traceable back to one particular document of ancient and glorious origin."[56]

But the dictum of Coke did not cross unaccompanied to reside in American constitutional and political theory. Before it made its spectacular appearance in James Otis' speech in the *Writs of Assistance Case* in 1761, the doctrine of a law fundamental, binding Parliament and king alike, and embodied to great extent in a particular document, had been joined by the theory of natural law expounded by John Locke. From the outset Locke finds that natural law approximates positive law. It was his object not only to place limitations upon legislative power but also to transform

[55] *ibid.*, pp. 366-70.

[56] *ibid.*, pp. 377-8.

the law of nature into the rights of men. "Coke's endeavor," Corwin has pointed out, "was to put forward the historical procedure of the common law as a permanent restraint on power, and especially on the power of the English crown. Locke, in the limitations which he imposes on legislative power, is looking rather to the security of the substantive rights of the individual—those rights which are implied in the basic arrangements of society at all times and in all places."[57]

It is a significant fact that the influence of the higher law doctrine associated with the names of Coke and Locke reached its height in England at the moment when the American colonies were being actively settled. While the notion of a higher law could not in England compete with the growing idea of parliamentary supremacy, it found congenial soil in the colonies. It was kept alive through repetition in the sermons of the dissenting clergymen and appealed with peculiar force to colonial lawyers. Yet the maintenance of higher law had been entrusted to legislative supremacy, though qualified by annual elections.[58] It is not surprising, therefore, that the introduction through Blackstone's *Commentaries* of the notion of legislative sovereignty into American political ideas was accomplished. What the study of Blackstone by American lawyers did was to present the notion of legislative sovereignty in contradiction to the earlier ideas of higher law derived from the writings of Coke and Locke.[59]

The history of American political thought since 1776 reveals the extent to which these conflicting notions have entered into the construction of our political institutions. Professor Corwin believes that through the adoption in the United States of a written Constitution, "higher law at last attained a form which made possible the attribution to it of an entirely new sort of validity, the validity of a *statute emanating from the sovereign people*. Once the binding force of higher law was transferred to this new basis, the notion of the sovereignty of the ordinary legislative organ disappeared automatically, since that cannot be a sovereign

[57] "The 'Higher Law' Background of American Constitutional Law," p. 393.
[58] *ibid.*, p. 404.
[59] *ibid.*, pp. 407-8.

law-making body which is subordinate to another law-making body."[60] The acceptance of this proposition necessitates recognition of the doctrine of popular sovereignty as it was conceived by the men of 1776.

The persistence of the notion of popular sovereignty in the United States has had a profound influence upon the development of political thought. The existence of this sovereignty could always be demonstrated by reference to the Constitution. That document stood as the tangible result of the exertion of the supreme power of the people of the United States. Since sovereignty was so manifestly in the hands of the people, the thought of imposing limitations upon its exercise seldom arose. The powers lodged in the various departments of the government were derived wholly from the Constitution and depended for their continuance upon the will of the people. An expression of that will could readily be obtained in accordance with specific provisions of the instrument. The idea of popular sovereignty has thus barred the way to the acceptance in the United States of the doctrines of the so-called political pluralists.

The pluralistic attack upon the theory of state sovereignty has been waged in recent years most effectively through the writings of H. J. Laski and G. D. H. Cole in England, and those of the eminent French jurist Duguit.[61] The theories advanced by these writers are extremely interesting and constitute an important phase of modern political philosophy, but the central concept of their thought is very simple. The fundamental issue which lies behind the pluralistic position is the much-debated question whether juristic persons are "fictitious" or "real" persons. Many years ago the German jurist Gierke vigorously championed the view that the organized bodies of society are "real" persons. He argued that the juristic personality of associations is not something made by the law. Such groups of people spring up spontaneously in response to the stimuli of human needs and attain a personality wholly

[60] *ibid.*, p. 409.

[61] See the excellent article of Professor F. J. Coker, "Pluralistic Theories and the Attack upon State Sovereignty," in Merriam and Barnes, pp. 80-119.

independent of any action on the part of the state. This personality, instead of being the creation of the law, is something which the law finds among the phenomena with which it has to deal. It is one of the data of positive law, and in that sense "real." "From the earliest times and among all nations," declared Gierke, "organized bodies have been recognized, over and above separate individuals, as subjects of legal rights and duties."[62] These associations the pluralists would place on a parity with the state.

But the denial of sovereignty to the state would appear to involve the rejection of the accomplished facts of the American Revolution. Throughout the seventeenth and eighteenth centuries to the American colonists sovereignty was in the hands of the king. The stirring events of 1776 merely substituted the people of the united colonies for the king.[63] The sovereign power which had been wielded by the king came into the possession of the people. The transfer was complete when the announcement was made that "these united colonies are, and of right ought to be free and independent States." Popular sovereignty as developed in 1776 might be dismissed as an ethical proposition if it were not for the establishment of the Constitution through the act of the people. When the people of the United States made use of the sovereignty which they had wrested from George III to ordain and establish for themselves a fundamental law, the notion of popular sovereignty was indeed clothed with reality. Thus the most important concept of American political thought, the sovereignty of the people, confutes the essential hypothesis of the political pluralists.

Although the pluralists have failed to obtain in the United States a sympathetic hearing for their criticisms of the theory of sovereignty, their ideas upon representation have been more cordially received. This has been due to the breakdown of the principle of representation expounded in the Federal Convention. The

[62] O. Gierke, *Deutsches Privatrecht* (1895), I, p. 468: R. Sohm, *Institutes of Roman Law* (Ledlie trans., 3rd ed., 1907), pp. 193-4 n. See also F. W. Maitland's introduction to his translation of a part of Gierke's *Genossenschaftsrecht* entitled *Political Theories of the Middle Age* (1900).

[63] W. S. Holdsworth, *Some Lessons From Our Legal History* (1928), pp. 118 *ff.*

popular will has not been discoverable, as the framers of the Constitution believed, through the exchange of opinions from the legislative districts. Experience has shown that "the sum or a combination of local impressions is not a wide enough base for national policy, and no base at all for the control of foreign policy."[64] This has led some writers to consider seriously the application of theories of group or functional representation devised by the pluralists to the American political system.[65]

But the apparent bankruptcy of the principle of representation which aimed to establish the legislature as a miniature of the electorate has been arrested by the rise of presidential leadership. It should not be forgotten that the principle of representation was from the beginning thought to extend to the executive as well as the other departments of government. With the growth of the party system the President has come to be regarded as the head of his party. After his nomination by the convention he is expected to represent the party before public opinion, and to stand before the country as the exponent of the purposes and principles of the party. Above all he is expected to achieve the victory for himself and his party ticket at the election. From the moment when the machinery of the electoral college passed under the control of a system of popular election, the presidency acquired a direct popular character.

It is precisely because of the popular character of the presidency that most theories of group representation break down when applied to the United States. The President cannot be made the representative of social or economic groups; he must be the representative of the entire electorate. In the cabinet system of government it is entirely possible to set up a ministry which shall carry on the work of administration and at the same time represent different economic groups within the state. But the Constitution of the United States is a standing repudiation of the principle of group representation. The whole question of elections turns on

[64] W. Lippmann, *Public Opinion* (1922), p. 288.

[65] See the summary of recent proposals in Carpenter, *Democracy and Representation*, pp. 85-8 nn.

that of the President; he can be the representative of but one party or group. The advocates of group representation in this country have therefore had to content themselves with proposals which restricted the application of the principle to one branch of the legislature.

More popular than the theories of group representation have been the special devices designed to set up direct legislation by the people. The introduction of the initiative and referendum is not inconsistent with the American theory of government. That theory regarded representation as a substitute for legislation by direct action of the people. It might therefore be expected that a breakdown in the representative system would lead the people to demand that they exercise directly the power of legislation. Unfortunately the reason for the failure of the traditional theory of representation has not always been made clear. "Wherever representative government fails," declared the late Senator LaFollette, "it fails because the representative proves incompetent or false to his trust."[66] This has not always been true, although there have been representatives who were both incompetent and corrupt. It is more reasonable to believe that the failure of the older theory of representation has been due in part at least to the tremendous burden placed upon the representative. Nor is there any reason to believe that the people will discharge the duties incidental to legislation with greater efficiency than the representatives.[67] What is required is not auxiliary devices for legislation but a reconstruction of the theory of representation.

It is impossible to say that a new view of the representative system is not already beginning to appear in the United States. The decline in prestige of legislative assemblies shows a corresponding increase in the representative character of the executive. Without doubt "an institution whose members habitually act from personal motives such as the desire for reelection can of itself make few im-

[66] *The Political Philosophy of Robert M. LaFollette* (1920), pp. 175-8. Quoted in Wright, *Source Book of American Political Theory*, p. 552.
[67] W. H. Taft, *Popular Government* (1913), Chap. III, IV.

portant decisions."[68] How far American legislatures are sinking in character is amply reflected in the political literature of the time. The initiative in legislation, especially in matters of finance, is rapidly passing into the hands of the executive. The representative character of the presidency rests upon a basis as substantial as that of Congress.[69] The time may not be far distant when representative assemblies in the United States will be stripped of all powers except those of watching over the executive and passing judgment upon its recommendations.[70]

Whether political theory in the United States will be stirred from the repose which it has enjoyed for more than half a century will likely depend upon the future social and economic development of the country. The democratic dogma is at present firmly established, but it rests upon the traditional theory of popular sovereignty rather than the inherent excellence of the system of government. It is superior to the defective machinery through which it finds expression in political action. For this reason the efforts of the lawyers to define a juristic theory of sovereignty applicable to the situation of the United States appear futile. The historical circumstances attending the formation of American political institutions cannot be brushed aside, nor can the importance of the power wielded by the people be minimized. Viewed in historical perspective this power will probably continue to be designated by the term sovereignty.

[68] H. Nickerson, "The Twilight of Legislatures," *American Mercury*, XIX, p. 132.
[69] Carpenter, *Democracy and Representation*, pp. 61 *ff.*
[70] See the interesting work of H. Belloc, *The House of Commons and Monarchy* (1920). A useful summary of the remarks in the Federal Convention on executive power will be found in Dunbar, Chap. v.

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